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ONTARIO LABOUR RELATIONS BOARD REPORTS

October 1994



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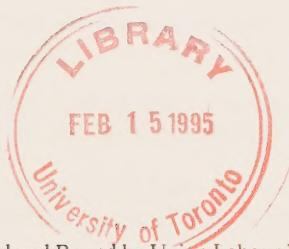
ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1994] OLRB REP. OCTOBER

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



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Natural Justice - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Reconsideration Labourers' union and Carpenters' union disputing assignment of work related to fabrication, installation and dismantling of bulkheads in Board Area 6 in ICI sector - Board directing that work be assigned to Carpenters - Labourers' union requesting reconsideration on various grounds, including assertion that "consultation" procedure violating rules of natural justice - Application for reconsideration dismissed

ROBERTSON YATES CORPORTATION LIMITED, UNITED FLOOR COMAPNY
LTD., CJA, LOCAL 785; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL,
LOCALS 506 AND 1081..... 1411

Petition - Certification - Charges - Evidence - Fraud - Intimidation and Coercion - Membership Evidence - Practice and Procedure - Timeliness - Union's certification application sent by registered mail on August 11 and employees' petition received by private courier at Board's office on August 12 - Rules of Procedure providing that date of filing is date document received by Board or, if mailed by registered mail, date on which it is mailed as verified by Post Office - Combined operation of section 8(4) of the Act and Board's Rules making petition untimely - Board dismissing objecting employees' allegations concerning union's collection of membership evidence for failure to make out *prima facie* case - Board declining objecting employees' request that Board exercise its discretion under section 8(3) of the Act to order representation - Certificate issuing

LUTHERAN NURSING HOME (OWEN SOUND); RE CLC; RE ROSANNE GIL-
LARD AND SANDRA MARSHALL 1362

Petition - Certification - Charges - Intimidation and Coercion - Membership Evidence - UFCW applying to represent bargaining unit of grocery store's meat department employees - Board according no weight to timely petition making reference to RWDSU and signed by employees before UFCW membership evidence collected - Board dismissing employer's allegations that membership evidence collected through intimidation and coercion - Certificate issuing

R.J. CHARTRAND HOLDINGS LIMITED C.O.B. AS CHARTRAND'S YOUR
INDEPENDENT GROCER; RE UFCW, LOCAL 633; RE GROUP OF EMPLOYEES .. 1407

Petition - Certification - Evidence - Practice and Procedure - Termination - Board ruling that employee who had been discharged contrary to the Act, prior to application to terminate union's bargaining rights, should be included on list of employees for purposes of the count - Board not giving any weight to petition sent to Board by fax - Applicant conceding that re-affirmation evidence filed by union representing voluntary expression of employee wishes - Application dismissed

MEAFORD BEAVER VALLEY COMMUNITY SUPPORT SERVICES; RE SONYA
TER STEGE; RE OPSEU 1375

Petition - Evidence - Practice and Procedure - Termination - Applicant not providing Board with detailed evidence of origination of petition, nor any evidence with respect to circulation of petition or continuity of carriage of petition after it was received by employee collecting signatures and then to the Board, nor any evidence of circumstances in which each and every signature collected - Union's non-suit motion granted - Application to terminate bargaining rights dismissed

MAPLE LODGE FARMS LTD.; RE GARAGE WORKERS MAPLE LODGE FARMS
LTD.; RE UFCW, LOCAL 175 1371

Practice and Procedure - Bargaining Unit - Combination of Bargaining Units - Remedies - Board earlier combining employer's "parts" and "manufacturing" bargaining units - Parties unable to resolve outstanding remedial issues surrounding application - Board directing parties to file further pleadings in order to facilitate hearing	
FMG TIMBERJACK INC.; RE GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL UNION	1333
Practice and Procedure - Certification - Charges - Evidence - Fraud - Intimidation and Coercion - Membership Evidence - Petition - Timeliness - Union's certification application sent by registered mail on August 11 and employees' petition received by private courier at Board's office on August 12 - Rules of Procedure providing that date of filing is date document received by Board or, if mailed by registered mail, date on which it is mailed as verified by Post Office - Combined operation of section 8(4) of the Act and Board's Rules making petition untimely - Board dismissing objecting employees' allegations concerning union's collection of membership evidence for failure to make out <i>prima facie</i> case - Board declining objecting employees' request that Board exercise its discretion under section 8(3) of the Act to order representation - Certificate issuing	
LUTHERAN NURSING HOME (OWEN SOUND); RE CLC; RE ROSANNE GILLARD AND SANDRA MARSHALL	1362
Practice and Procedure - Certification - Evidence - Petition - Termination - Board ruling that employee who had been discharged contrary to the Act, prior to application to terminate union's bargaining rights, should be included on list of employees for purposes of the count - Board not giving any weight to petition sent to Board by fax - Applicant conceding that re-affirmation evidence filed by union representing voluntary expression of employee wishes - Application dismissed	
MEAFORD BEAVER VALLEY COMMUNITY SUPPORT SERVICES; RE SONYA TER STEGE; RE OPSEU	1375
Practice and Procedure - Construction Industry - Jurisdictional Dispute - Natural Justice - Reconsideration - Labourers' union and Carpenters' union disputing assignment of work related to fabrication, installation and dismantling of bulkheads in Board Area 6 in ICI sector - Board directing that work be assigned to Carpenters - Labourers' union requesting reconsideration on various grounds, including assertion that "consultation" procedure violating rules of natural justice - Application for reconsideration dismissed	
ROBERTSON YATES CORPORATION LIMITED, UNITED FLOOR COMPANY LTD., CJA, LOCAL 785; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LOCALS 506 AND 1081.....	1411
Practice and Procedure - Evidence - Petition - Termination - Applicant not providing Board with detailed evidence of origination of petition, nor any evidence with respect to circulation of petition or continuity of carriage of petition after it was received by employee collecting signatures and then to the Board, nor any evidence of circumstances in which each and every signature collected - Union's non-suit motion granted - Application to terminate bargaining rights dismissed	
MAPLE LODGE FARMS LTD.; RE GARAGE WORKERS MAPLE LODGE FARMS LTD.; RE UFCW, LOCAL 175	1371
Ratification and Strike Vote - Change in Working Conditions - Employee - Strike - Strike Replacement Workers - Unfair Labour Practice - Union's compliance with section 74(5) of Act arising in context of strike replacement application - Whether laid off employee with only possibility of recall entitled to participate in strike vote - Parties agreeing that individual entitled to vote only if found to be employee in bargaining unit - Board finding individual without sufficiently substantial employment attachment to be considered employee	

within bargaining unit with entitlement to vote - Board finding that employer carrying on business as before in hiring students who had worked for it for the last 4 summers and not recalling individual from lay-off who had worked for it for three weeks almost one year earlier - Applications alleging violation of statutory freeze and violation of strike replacement ban dismissed

GOULARD LUMBER (1971) LIMITED, MARK GOULARD AND ROMEO GOULARD RE IWA-CANADA, LOCAL 1-2693 AND LEO LAFLEUR 1334

Reconsideration - Construction Industry - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Labourers' union and Carpenters' union disputing assignment of work related to fabrication, installation and dismantling of bulkheads in Board Area 6 in ICI sector - Board directing that work be assigned to Carpenters - Labourers' union requesting reconsideration on various grounds, including assertion that "consultation" procedure violating rules of natural justice - Application for reconsideration dismissed

ROBERTSON YATES CORPORATION LIMITED, UNITED FLOOR COMPANY LTD., CJA, LOCAL 785; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LOCALS 506 AND 1081 1411

Reference - Hospital Labour Disputes Arbitration Act - Employees of organization providing services to adults with developmental handicaps found to be "hospital employees" within meaning of Hospital Labour Disputes Arbitration Act

SUREX COMMUNITY SERVICES; RE OPSEU AND ITS LOCAL 5102 1430

Related Employer - Construction Industry - Sale of a Business - Board not accepting union's characterization of certain individual as "key man" during relevant period - Two and one half years separating departure of alleged "key man" from company A and his joining company B - Company A continuing to grow and prosper following departure of alleged "key man" - Sale of a business and related employer applications dismissed

TRI-CORPS INDUSTRIAL CONTRACTORS, INDUSTRIAL LABOUR CORPS. INC., SCOTRON HOLDINGS INC., CHRISTMAN & LEITCH CONTRACTORS LTD., CHRISTMAN & ASSOCIATES CONTRACTORS LTD.; RE THE MILL-WRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF LOCAL 1916 1446

Related Employer - Construction Industry - Unfair Labour Practice - Construction company violating Act by incorporating new company in order to enter into agreement with Labourers' union with respect to employees who, absent the incorporation, would have been represented by Bricklayers' union - Bricklayers seeking related employer declaration in respect of a number of construction contractors - Board issuing declaration in respect of three of the companies, but not in respect of fourth company - Board exercising its discretion against making declaration where its effect would be tantamount to a revocation of Labourers' certificate with respect to fourth company

BAYRITZ CONSTRUCTION LTD. AND BAYRITZ MASONRY LTD. AND DAKOTA MASONRY LTD. AND 986153 ONTARIO LTD. C.O.B. AS YELLOW BRICK MASONRY AND SUNDIAL BRICKLAYERS INC.; RE BAC; RE LIUNA, LOCAL 183 1283

Remedies - Bargaining Unit - Combination of Bargaining Units - Practice and Procedure - Board earlier combining employer's "parts" and "manufacturing" bargaining units - Parties unable to resolve outstanding remedial issues surrounding application - Board directing parties to file further pleadings in order to facilitate hearing

FMG TIMBERJACK INC.; RE GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL UNION 1333

XII

Remedies - Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Unfair Labour Practice - Union seeking interim relief in connection with unfair labour practice complaint alleging that demotion of employee from group leader position violating the Act - Board directing that employee be reinstated to his position on interim basis pending final disposition of unfair labour practice complaint

LEO SAKATA ELECTRONICS (CANADA) LTD.; RE IWA CANADA

1359

Sale of a Business - Abandonment - Bargaining Rights - Union alleging that transfer of inactive sawmill amounting to sale of a business - Alleged successor employer arguing that union had abandoned its bargaining rights before the transfer and that it had purchased mere "assets", not a "business" - Collective agreement made in 1984 terminated and no replacement or renewal agreement entered into - Evidence of union's continuing interest and activity satisfying Board that union had not abandoned bargaining rights - Seven year hiatus between closure of mill and sale not detracting from conclusion that successor purchasing capacity to carry on the business formerly conducted by predecessor in relation to the mill - Board declaring that union continuing to be bargaining agent in respect of sawmill operations as if successor were predecessor

LONG LAKE FOREST PRODUCTS INC., AND KIMBERLY CLARK FOREST PRODUCTS INC.; RE IWA CANADA LOCAL 2693; RE GINOOGAMING FIRST NATION AND LONG LAKE EMPLOYEES ASSOCIATION

1343

Sale of a Business - Construction Industry - Related Employer - Board not accepting union's characterization of certain individual as "key man" during relevant period - Two and one half years separating departure of alleged "key man" from company A and his joining company B - Company A continuing to grow and prosper following departure of alleged "key man" - Sale of a business and related employer applications dismissed

TRI-CORPS INDUSTRIAL CONTRACTORS, INDUSTRIAL LABOUR CORPS. INC., SCOTRON HOLDINGS INC., CHRISTMAN & LEITCH CONTRACTORS LTD., CHRISTMAN & ASSOCIATES CONTRACTORS LTD.; RE THE MILL-WRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF LOCAL 1916.....

1446

Sale of a Business - Successor security company contracting to provide services at three locations where employees already represented by USWA - Successor having collective agreement with CSU including municipality-wide bargaining unit - USWA and CSU each asserting bargaining rights at the three locations - Board exercising authority under section 64(6) of the Act and declaring that employees at the three locations bound by collective agreement between successor and CSU

ENSIGN SECURITY SERVICES INC.; RE USWA AND CANADIAN SECURITY UNION; RE PINKERTON'S OF CANADA LIMITED AND BURNS INTERNATIONAL SECURITY SERVICES LIMITED

1310

Sale of a Business - Union alleging "sale of a business" where municipality cancelling its contract with transit company and "taking back" operation of municipality's transit system - Transit company found in earlier Board decision to be federal undertaking - *Labour Relations Act* amendments providing in section 64.1 that successor rights provisions applying to federal-to-provincial sales, but amendments coming into force only on January 1, 1993 - Respondents asserting that transaction occurred on December 31, 1992 and that section 64.1 of the Act having no application - Respondents also denying that transaction amounting to "sale of a business" - Board satisfied that by acquiring substantial part of work force previously employed by transit company, municipality transferring to itself an essential element of that business - Board concluding that municipality's hiring of employees on and after January 1,

1993 triggering sale and that section 64.1 of the Act applying to the transaction - Board finding and declaring sale of a business

CHARTERWAYS TRANSPORTATION LIMITED, THE CORPORATION OF THE TOWN OF AJAX; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 222

1296

Settlement - Employer - Interference in Trade Unions - Intimidation and Coercion - Judicial Review - Stay - Strike - Strike Replacement Workers - Unfair Labour Practice - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under section 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the Act - Red Cross applying for judicial review on ground that subject matter of Board's unfair labour practice finding had been settled by parties and withdrawn - Red Cross seeking stay of Board's decision pending determination of judicial review application - Stay application dismissed

THE CANADIAN RED CROSS SOCIETY (ONTARIO DIVISION); RE ONTARIO LABOUR RELATIONS BOARD AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCALS 204 and 532.....

1466

Stay - Employer - Interference in Trade Unions - Intimidation and Coercion - Judicial Review - Settlement - Strike - Strike Replacement Workers - Unfair Labour Practice - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under section 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the Act - Red Cross applying for judicial review on ground that subject matter of Board's unfair labour practice finding had been settled by parties and withdrawn - Red Cross seeking stay of Board's decision pending determination of judicial review application - Stay application dismissed

THE CANADIAN RED CROSS SOCIETY (ONTARIO DIVISION); RE ONTARIO LABOUR RELATIONS BOARD AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCALS 204 and 532.....

1466

Strike - Change in Working Conditions - Employee - Ratification and Strike Vote - Strike Replacement Workers - Unfair Labour Practice - Union's compliance with section 74(5) of Act arising in context of strike replacement application - Whether laid off employee with only possibility of recall entitled to participate in strike vote - Parties agreeing that individual entitled to vote only if found to be employee in bargaining unit - Board finding individual without sufficiently substantial employment attachment to be considered employee within bargaining unit with entitlement to vote - Board finding that employer carrying on business as before in hiring students who had worked for it for the last 4 summers and not recalling individual from lay-off who had worked for it for three weeks almost one year ear-

XIV

lier - Applications alleging violation of statutory freeze and violation of strike replacement ban dismissed

GOULARD LUMBER (1971) LIMITED, MARK GOULARD AND ROMEO GOULARD RE IWA-CANADA, LOCAL 1-2693 AND LEO LAFLEUR

1334

Strike - Employer - Interference in Trade Unions - Intimidation and Coercion - Judicial Review - Settlement - Stay - Strike Replacement Workers - Unfair Labour Practice - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under section 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the Act - Red Cross applying for judicial review on ground that subject matter of Board's unfair labour practice finding had been settled by parties and withdrawn - Red Cross seeking stay of Board's decision pending determination of judicial review application - Stay application dismissed

THE CANADIAN RED CROSS SOCIETY (ONTARIO DIVISION); RE ONTARIO LABOUR RELATIONS BOARD AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCALS 204 and 532.....

1466

Strike - Interference in Trade Unions - Intimidation and Coercion - Lock-Out - Strike Replacement Workers - Unfair Labour Practice - Board providing reasons for earlier bottom-line decision in respect of lock-out and violation of section 73.1 of the Act - Wearing of union T-shirts in workplace lawful activity protected by Act - Employer's refusal to allow employees wearing such T-shirts to work amounting to lock-out - Employer violating section 73.1 of the Act by using services of other employees in bargaining unit during lock-out - Board directing employer to cease and desist from using services of employees in bargaining unit so long as lock-out continuing

MISSISSAUGA HYDRO ELECTRIC COMPANY; RE IBEW, LOCAL 636.....

1376

Strike - Strike Replacement Workers - Union complaining about building owner's management staff doing clean-up work during strike of cleaning contractor's employees - Board concluding that building owner acting on its own behalf, not "acting on behalf of" cleaning contractor employer - Union also alleging that introduction of new machinery after commencement of strike violating Act - Application alleging violation of section 73.1 of the Act dismissed

MODERN BUILDING CLEANING INC., CENTENNIAL CENTRE OF SCIENCE AND TECHNOLOGY (THE "ONTARIO SCIENCE CENTRE") AND THE INDIVIDUALS LISTED AT SCHEDULE "A"; RE OPSEU.....

1390

Strike Replacement Workers - Change in Working Conditions - Employee - Ratification and Strike Vote - Strike - Unfair Labour Practice - Union's compliance with section 74(5) of Act arising in context of strike replacement application - Whether laid off employee with only possibility of recall entitled to participate in strike vote - Parties agreeing that individual entitled to vote only if found to be employee in bargaining unit - Board finding individual without sufficiently substantial employment attachment to be considered employee within bargaining unit with entitlement to vote - Board finding that employer carrying on business as before in hiring students who had worked for it for the last 4 summers and not recalling individual from lay-off who had worked for it for three weeks almost one year earlier -

Applications alleging violation of statutory freeze and violation of strike replacement ban dismissed

GOULARD LUMBER (1971) LIMITED, MARK GOULARD AND ROMEO GOULARD RE IWA-CANADA, LOCAL 1-2693 AND LEO LAFLEUR 1334

Strike Replacement Workers - Interference in Trade Unions - Intimidation and Coercion - Lock-Out - Strike - Unfair Labour Practice - Board providing reasons for earlier bottom-line decision in respect of lock-out and violation of section 73.1 of the Act - Wearing of union T-shirts in workplace lawful activity protected by Act - Employer's refusal to allow employees wearing such T-shirts to work amounting to lock-out - Employer violating section 73.1 of the Act by using services of other employees in bargaining unit during lock-out - Board directing employer to cease and desist from using services of employees in bargaining unit so long as lock-out continuing

MISSISSAUGA HYDRO ELECTRIC COMPANY; RE IBEW, LOCAL 636 1376

Strike Replacement Workers - Employer - Interference in Trade Unions - Intimidation and Coercion - Judicial Review - Settlement - Stay - Strike - Unfair Labour Practice - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under section 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the Act - Red Cross applying for judicial review on ground that subject matter of Board's unfair labour practice finding had been settled by parties and withdrawn - Red Cross seeking stay of Board's decision pending determination of judicial review application - Stay application dismissed

THE CANADIAN RED CROSS SOCIETY (ONTARIO DIVISION); RE ONTARIO LABOUR RELATIONS BOARD AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCALS 204 and 532 1466

Strike Replacement Workers - Strike - Union complaining about building owner's management staff doing clean-up work during strike of cleaning contractor's employees - Board concluding that building owner acting on its own behalf, not "acting on behalf of" cleaning contractor employer - Union also alleging that introduction of new machinery after commencement of strike violating Act - Application alleging violation of section 73.1 of the Act dismissed

MODERN BUILDING CLEANING INC., CENTENNIAL CENTRE OF SCIENCE AND TECHNOLOGY (THE "ONTARIO SCIENCE CENTRE") AND THE INDIVIDUALS LISTED AT SCHEDULE "A"; RE OPSEU 1390

Termination - Certification - Evidence - Petition - Practice and Procedure - Board ruling that employee who had been discharged contrary to the Act, prior to application to terminate union's bargaining rights, should be included on list of employees for purposes of the count - Board not giving any weight to petition sent to Board by fax - Applicant conceding that re-affirmation evidence filed by union representing voluntary expression of employee wishes - Application dismissed

MEAFORD BEAVER VALLEY COMMUNITY SUPPORT SERVICES; RE SONYA TER STEGE; RE OPSEU 1376

Termination - Collective Agreement - Timeliness - Union alleging that termination application untimely because collective agreement in effect - Employer submitting that no collective agreement in effect and that, as result of union striking, offer it had made no longer out-

standing for union to accept - Board determining that collective agreement in effect and that application untimely - Application to terminate bargaining rights dismissed	
SHOPPERS DRUG MART, KATALIN LANCZI PHARMACY LTD. C.O.B. AS; RE PAMELA BLAIS; RE RWDSU, CANADIAN SERVICE SECTOR DIVISION OF THE USWA, LOCALS 414, 422, 440, 448, 461, 483, 488, 1000 AND 1688.....	1419
Termination - Evidence - Petition - Practice and Procedure - Applicant not providing Board with detailed evidence of origination of petition, nor any evidence with respect to circulation of petition or continuity of carriage of petition after it was received by employee collecting signatures and then to the Board, nor any evidence of circumstances in which each and every signature collected - Union's non-suit motion granted - Application to terminate bargaining rights dismissed	
MAPLE LODGE FARMS LTD.; RE GARAGE WORKERS MAPLE LODGE FARMS LTD.; RE UFCW, LOCAL 175	1371
Timeliness - Certification - Charges - Evidence - Fraud - Intimidation and Coercion - Membership Evidence - Petition - Practice and Procedure - Union's certification application sent by registered mail on August 11 and employees' petition received by private courier at Board's office on August 12 - Rules of Procedure providing that date of filing is date document received by Board or, if mailed by registered mail, date on which it is mailed as verified by Post Office - Combined operation of section 8(4) of the Act and Board's Rules making petition untimely - Board dismissing objecting employees' allegations concerning union's collection of membership evidence for failure to make out <i>prima facie</i> case - Board declining objecting employees' request that Board exercise its discretion under section 8(3) of the Act to order representation vote - Certificate issuing	
LUTHERAN NURSING HOME (OWEN SOUND); RE CLC; RE ROSANNE GIL-LARD AND SANDRA MARSHALL	1362
Timeliness - Collective Agreement - Termination - Union alleging that termination application untimely because collective agreement in effect - Employer submitting that no collective agreement in effect and that, as result of union striking, offer it had made no longer outstanding for union to accept - Board determining that collective agreement in effect and that application untimely - Application to terminate bargaining rights dismissed	
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Unfair Labour Practice - Change in Working Conditions - Employee - Ratification and Strike Vote - Strike - Strike Replacement Workers - Union's compliance with section 74(5) of Act arising in context of strike replacement application - Whether laid off employee with only possibility of recall entitled to participate in strike vote - Parties agreeing that individual entitled to vote only if found to be employee in bargaining unit - Board finding individual without sufficiently substantial employment attachment to be considered employee within bargaining unit with entitlement to vote - Board finding that employer carrying on business as before in hiring students who had worked for it for the last 4 summers and not recalling individual from lay-off who had worked for it for three weeks almost one year earlier - Applications alleging violation of statutory freeze and violation of strike replacement ban dismissed	
GOULARD LUMBER (1971) LIMITED, MARK GOULARD AND ROMEO GOULARD RE IWA-CANADA, LOCAL 1-2693 AND LEO LAFLEUR	1334
Unfair Labour Practice - Construction Industry - Related Employer - Construction company violating Act by incorporating new company in order to enter into agreement with Labourers' union with respect to employees who, absent the incorporation, would have been repre-	

sented by Bricklayers' union - Bricklayers seeking related employer declaration in respect of a number of construction contractors - Board issuing declaration in respect of three of the companies, but not in respect of fourth company - Board exercising its discretion against making declaration where its effect would be tantamount to a revocation of Labourers' certificate with respect to fourth company

BAYRITZ CONSTRUCTION LTD. AND BAYRITZ MASONRY LTD. AND DAKOTA MASONRY LTD. AND 986153 ONTARIO LTD. C.O.B. AS YELLOW BRICK MASONRY AND SUNDIAL BRICKLAYERS INC.; RE BAC; RE LIUNA, LOCAL 183

1283

Unfair Labour Practice - Employer - Interference in Trade Unions - Intimidation and Coercion - Judicial Review - Settlement - Stay - Strike - Strike Replacement Workers - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under section 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the Act - Red Cross applying for judicial review on ground that subject matter of Board's unfair labour practice finding had been settled by parties and withdrawn - Red Cross seeking stay of Board's decision pending determination of judicial review application - Stay application dismissed

THE CANADIAN RED CROSS SOCIETY (ONTARIO DIVISION); RE ONTARIO LABOUR RELATIONS BOARD AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCALS 204 and 532.....

1466

Unfair Labour Practice - Interference in Trade Unions - Intimidation and Coercion - Lock-Out - Strike - Strike Replacement Workers - Board providing reasons for earlier bottom-line decision in respect of lock-out and violation of section 73.1 of the Act - Wearing of union T-shirts in workplace lawful activity protected by Act - Employer's refusal to allow employees wearing such T-shirts to work amounting to lock-out - Employer violating section 73.1 of the Act by using services of other employees in bargaining unit during lock-out - Board directing employer to cease and desist from using services of employees in bargaining unit so long as lock-out continuing

MISSISSAUGA HYDRO ELECTRIC COMPANY; RE IBEW, LOCAL 636.....

1376

Unfair Labour Practice - Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Union seeking interim relief in connection with unfair labour practice complaint alleging that demotion of employee from group leader position violating the Act - Board directing that employee be reinstated to his position on interim basis pending final disposition of unfair labour practice complaint

LEO SAKATA ELECTRONICS (CANADA) LTD.; RE IWA CANADA

1359

1424-93-R; 1984-93-U; 1985-93-G International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Applicants v. **Bayritz Construction Ltd.** and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry and Sundial Bricklayers Inc., Responding Parties v. Labourers' International Union of North America, Local 183, Intervenor; International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and The Ontario Provincial Conference of Bricklayers and Allied Craftsmen, Applicants v. Bayritz Construction Ltd. and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry and Sundial Bricklayers Inc. and Labourers' International Union of North America, Local 183, Responding Parties; International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and The Ontario Provincial Conference of Bricklayers and Allied Craftsmen, Applicants v. Bayritz Construction Ltd. and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry and Sundial Bricklayers Inc., Responding Parties

Construction Industry - Related Employer - Unfair Labour Practice - Construction company violating Act by incorporating new company in order to enter into agreement with Labourers' union with respect to employees who, absent the incorporation, would have been represented by Bricklayers' union - Bricklayers seeking related employer declaration in respect of a number of construction contractors - Board issuing declaration in respect of three of the companies, but not in respect of fourth company - Board exercising its discretion against making declaration where its effect would be tantamount to a revocation of Labourers' certificate with respect to fourth company

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *N. L. Jesin*, *D. Buttazzoni* and *B. Griffiths* for the applicant; *M. Lewis* and *Q. Ceolin* for the Labourers' International Union of North America, Local 183; and *A. Carvalho* for the remaining responding parties.

DECISION OF THE BOARD; October 3, 1994

1. The title of proceedings in all of the above Board files is amended to omit reference to "Yellow Brick Masonry" and "986153 Ontario Ltd." as separate responding parties and name "986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry" as a responding party.
2. Board File No. 1424-93-R is an application under sections 64 and 1(4) of the *Labour Relations Act* (the "Act") in which the applicants (the "Bricklayers") assert that there has been a sale of business from Bayritz Construction Ltd. ("Bayritz") to the remaining responding parties or that the responding parties constitute one employer for the purposes of the Act. The intervenor, the Labourers' International Union of North America, Local 183, ("Local 183") does not dispute that the responding parties carry on associated or related activities under common control or direction within the meaning of section 1(4) of the Act, but takes the position that the Board should exercise its discretion and not grant a declaration with respect to Sundial Bricklayers Inc. ("Sundial") as Local 183 has had bargaining rights with respect to bricklayers and bricklayers' apprentices and stonemasons and stonemasons' apprentices employed by Sundial in the non-ICI sectors of the construction industry in Board Area 8 since August 1991. Although Local 183 initially took the

same position with respect to 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry ("Yellow Brick"), Local 183 advised the Board at the commencement of the hearing that it was abandoning its bargaining rights with respect to Yellow Brick and was not opposed to a declaration with respect to Yellow Brick.

3. Board File No. 1984-93-U is an application under section 91 of the Act in which the applicants assert that the responding parties violated sections 3, 49, 65, 67, 68 and 71 of the Act. The applicants allege that the owner of Bayritz, Antonio Carvalho, created Yellow Brick and Sundial at the instigation of Local 183 and entered into collective agreements pertaining to Yellow Brick and Sundial with Local 183 in an effort to avoid and undermine the applicants' bargaining rights. Local 183 denies such allegation. Mr. Carvalho acknowledges that he incorporated Yellow Brick in order to enter into an agreement with Local 183 but denies that such was done at the instigation of Local 183.

4. Board File No. 1985-93-G is a related application under section 126 of the Act. Board File No. 1424-93-R and 1984-93-U were heard together on March 29, 30 and July 27, 1994. Board File No. 1985-93-G was adjourned pending disposition of Board files 1424-93-R and 1984-93-U.

5. At the conclusion of the hearing of this matter on July 27, 1994, the Board provided the parties with a bottom-line ruling with reasons to follow. The substance of the Board's bottom-line ruling is set out at paragraph 57 of this decision. The following is the Board's reasons therefore.

6. Mr. Antonio Carvalho appeared at the hearing on behalf of the responding parties without legal counsel. Mr. Carvalho was advised that, although there is no requirement that parties appearing before the Board retain legal counsel, Board hearings are legal proceedings and persons appearing on their own bear any risk involved with doing so. Mr. Carvalho was advised that the Board is an adjudicative tribunal and as such we could not advise him as to how he should proceed. We did, however, explain to Mr. Carvalho the process to be followed at the hearing, i.e. the examination and cross-examination of witnesses, the opportunity to make submissions, etc. Mr. Carvalho was given an opportunity throughout the hearing to participate but, aside from being called a witness by the Bricklayers, declined to do so.

Facts

7. On May 1, 1984 the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen were voluntarily recognized by A and C Masonry Ltd. to represent bricklayers and bricklayers' apprentices and stonemasons and stonemasons' apprentices employed by A and C Masonry Ltd. in the ICI sector of the construction industry. On November 15, 1984 the International Union of Bricklayers and Allied Craftsmen, Local 2 was voluntarily recognized to represent all bricklayers and bricklayers' apprentices and stonemasons and stonemasons' apprentices employed by A and C Masonry Ltd. in the residential sector of the construction industry in Board Area 8. It is not in dispute that Bayritz is a successor employer of A and C Masonry Ltd.

8. Mr. Carvalho is the sole director and officer of Bayritz. Maria Ferreira is a former director and officer of Bayritz. The head office of Bayritz is 77 Guthrie Avenue, Mr. Carvalho's residential address.

9. Sundial was incorporated in May 1990. The address of Sundial's head office is Mr. Carvalho's residential address. Sundial was actively engaged in the construction industry during 1990 and 1991. The Bricklayers did not assert or seek bargaining rights during this period of time. In August 1991 Local 183 applied to be certified to represent all bricklayers, bricklayers' apprentices

and construction labourers in the employ of Sundial in all non-ICI sectors of the construction industry in Board Area 8. Presumably, notice of such application was provided to the employees of Sundial. It would appear that no employees sought to intervene or otherwise advise the Board that they were represented by the Bricklayers as Local 183 was subsequently certified with respect to the bargaining unit sought. Following negotiations and the appointment of a conciliation officer, a No Board Report was issued on May 12, 1992. On July 20, 1992, Local 183 and Sundial entered into a collective agreement. The collective agreement was executed by Mr. Carvalho's partner. Local 183 was unaware of Mr. Carvalho's involvement in Sundial until the commencement of the instant proceedings.

10. The Board heard very little evidence concerning Dakota Masonry Ltd. ("Dakota") and Bayritz Masonry Ltd. The application under sections 64 and 1(4) of the Act indicates that the applicants conducted a corporate search with respect to Bayritz Masonry Ltd. and no such entity was found. A photocopy of business cards appended to the application indicates that the offices of Bayritz Masonry (spelled on the card "Bay Ritz Masonry Ltd.") and Dakota are located in the same premises and share the same phone, fax and mobile numbers. The logos used on the business cards of Dakota and Bayritz Masonry are identical.

11. On June 19, 1991 Local 183 applied for certification of all bricklayers, bricklayers' apprentices and construction labourers employed by Bayritz Masonry in the non-ICI sectors of the construction industry in Board Area 8. The matter proceeded to a hearing before the Board on April 24, 1992 at which time the Bricklayers satisfied Local 183 that Bayritz Masonry was bound to a non-ICI agreement covering bricklayers and bricklayers' apprentices in Board Area 8. Local 183 amended its application and was certified to represent labourers employed by Bayritz Masonry in all non-ICI sectors of the construction industry in Board Area 8 on April 27, 1992. No certificate or voluntary recognition agreement with respect to *Bayritz Masonry* was produced by the applicants, however, as indicated above, the applicants have bargaining rights with respect to bricklayers, stonemasons and their apprentices employed by *Bayritz Construction Ltd.* It would appear that, at the time of Local 183's application for certification and continuing to date, both the applicants and Local 183 consider Bayritz Construction Ltd. and Bayritz Masonry Ltd. to be one and the same entity.

12. Immediately following the April 24, 1992 Board hearing concerning Local 183's application for certification with respect to Bayritz Masonry, Mr. Carvalho had a brief conversation with Quinto Ceolin, a business representative of Local 183. Mr. Ceolin indicated to Mr. Carvalho that, if he wanted to work in the residential sector of the construction industry, he would have to have an agreement with either Local 183 or the Bricklayers' Masons Independent Union of Canada, Local 1 ("Local 1"). Mr. Ceolin was referring to the fact that Local 183 and the Metropolitan Toronto Apartment Builders Association (the "MTABA") had recently agreed to a subcontracting clause which, once effective, would require all contractors bound to the MTABA agreement to contract or subcontract work covered by the subcontracting clause to contractors in contractual relations with Local 183 or Local 1 (the "subcontracting clause").

13. On May 1, 1992, only days after the Board proceedings with respect to Bayritz Masonry, Dakota voluntarily recognized the International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario as the bargaining agent on behalf of all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the ICI sector and all non-ICI sectors in Board Area 8 as well as all labourers in all non-ICI sectors of the construction industry in Board Area 8.

14. On May 7, 1992 Mr. Carvalho caused Yellow Brick to be incorporated in order that he

could enter into a collective agreement with Local 183. The sole director and officer of Yellow Brick is Maria Ferreira. The registered head office of Yellow Brick is 34 High Street, Etobicoke.

15. Following negotiation of the subcontracting clause in April 1992, Mr. Carvalho was advised by a number of builders that he could not work with them unless he had an agreement with Local 183 or Local 1.

16. As a result of concern created by the subcontracting clause amongst masonry contractors, one such contractor arranged a meeting on July 2, 1992. Representatives of Local 183 were invited to speak at the meeting in order to clarify what was happening in the industry. Approximately 60 to 70 people, including Mr. Carvalho, representing approximately 30 different masonry contractors, attended this meeting.

17. Mr. Dionisio, the President of Local 183, spoke at the meeting. He indicated, amongst other things, that, as a result of the subcontracting clause, builders bound to the MTABA agreement would be required to subcontract work to masonry contractors in contractual relations with either Local 1 or Local 183. Contractors were told that, if they did not have an agreement with either Local 183 or Local 1, they would have difficulty getting work in the residential sector of the construction industry. Mr. Dionisio indicated that contractors could expect to be affected by the provision in 1993. Following Mr. Dionisio's remarks, representatives of Local 183 spoke with the contractors individually with a view to entering into voluntary recognition agreements with them. Approximately 10 to 12 contractors signed agreements. Mr. Carvalho entered into a voluntary recognition agreement with Local 183 pertaining to Yellow Brick at this meeting. Mr. Ceolin signed the voluntary recognition agreement on behalf of Local 183. Mr. Ceolin testified that, at the time of the signing the voluntary recognition agreement, he did not recognize Mr. Carvalho as a principal of Bayritz. As is discussed in greater detail below, Local 183, and Mr. Ceolin in particular, were in contact with numerous masonry contractors during the summer of 1992. Given the large number of contractors Mr. Ceolin spoke with during the summer of 1992, we accept that Mr. Ceolin did not associate Mr. Carvalho with Bayritz when they met in July 1992.

18. In the summer of 1993, Mr. Carvalho attended a meeting with representatives of the Bricklayers. At this meeting, the Bricklayers asked Mr. Carvalho to sign a voluntary recognition agreement on behalf of Yellow Brick and Sundial with the Bricklayers. Mr. Carvalho was advised that, if he did not sign with the Bricklayers, the Bricklayers would take him to the Board and damages would be sought. Mr. Carvalho advised the Bricklayers that he could not sign an agreement on behalf of Yellow Brick and Sundial as he had already signed these two companies with Local 183. Mr. Carvalho indicated that Mr. Ceolin had told him that he would need another company in order to sign an agreement with Local 183 and that if he did not get a company to go with Local 183, he "would be out". At the hearing Mr. Carvalho testified that he did not intend to say that Mr. Ceolin told him that he would need another *company* to sign with Local 183 but rather that he would need an *agreement* with Local 183 or Local 1 in order to work in the residential sector of the construction industry.

19. Local 183 began organizing bricklayers in 1991. In 1991 and 1992 Local 183 filed approximately 65 to 75 applications for certification to represent bricklayers, the majority of which were successful. Local 183 did not file applications for the appointment of a conciliation officer with respect to any individual contractor until such time as it had attempted to have each of the newly certified contractors sign an agreement. Applications were then filed with respect to all of the contractors who either did not sign or could not be located at the same time. As a result, Local 183 obtained approximately 40 No Board Reports in May 1992. During the summer of 1992, Local 183 was approached by numerous contractors concerning the possibility of entering into a volun-

tary recognition agreement. Approximately 50 to 60 of those contractors signed voluntary recognition agreements. Many others did not.

20. The application in Board File No. 1424-93-R was filed on July 28, 1993. The application in Board File 1984-93-U was filed on September 16, 1993.

SECTION 91 COMPLAINT

Argument

21. The Bricklayers assert that the responding parties have violated the following sections of the Act:

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

49. An agreement between an employer or employers' organization and a trade union is deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or employers' organization participated in the formation or administration of the trade union; or
- (b) if an employer or employers' organization contributed financial or other support to the trade union.

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

68.- (1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the

employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

22. The applicants submit that Yellow Brick was created by Mr. Carvalho at the instigation of Mr. Ceolin and in a combined effort of the responding parties to avoid and undermine the Bricklayers' bargaining rights and that such conduct violates sections 49, 65, 67, 68 and 71 of the Act.

23. The applicants submit that, by extending bargaining rights to Local 183 and signing collective agreements with Local 183 in the face of the Bricklayers' pre-existing bargaining rights, Yellow Brick and Sundial have given employer support to Local 183 contrary to section 49 of the Act.

24. The applicants submit that Local 183 was aware of the Bricklayers' pre-existing collective bargaining relationship with Mr. Carvalho's businesses and consequently was in violation of sections 65, 67, 68 and 71 of the Act when it entered into voluntary recognition agreements with Yellow Brick and a collective agreement with Sundial.

25. In support of its submission that Local 183 violated the Act as aforesaid, the applicants rely on the fact that Mr. Carvalho and Mr. Ceolin had a conversation at the Board on April 27, 1992 and that, only days later, on May 7, 1992, Mr. Carvalho caused Yellow Brick to be incorporated. The applicants point to the fact that Mr. Carvalho executed a voluntary recognition agreement on behalf of Yellow Brick at the July 2, 1992 meeting after listening to comments made by Mr. Dionisio. The voluntary recognition agreement pertaining to Sundial was entered into with Local 183 shortly thereafter, on July 20, 1992. The applicants further rely on the fact that Mr. Carvalho, at a meeting with representatives of the Bricklayers in 1993, informed the Bricklayers that Mr. Ceolin had told him that he would need to start a new company in order to get an agreement with Local 183.

26. In support of its submission that Yellow Brick violated the Act as aforesaid, the applicants rely on Mr. Carvalho's admission that he incorporated Yellow Brick for the sole purpose of entering into a voluntary recognition agreement with Local 183.

27. In support of its submission that Sundial violated the Act as aforesaid, the applicants rely on the fact that, notwithstanding that Local 183 was certified in August 1991, Sundial did not enter into a collective agreement with Local 183 until July 1992. The applicant submits that it can be reasonably inferred from the timing of the signing of the collective agreement that Sundial entered into the agreement to avoid and undermine the Bricklayers' bargaining rights. It was not alleged that Sundial's incorporation in May 1990, was designed to avoid or undermine the applicants' bargaining rights.

28. Local 183 denies that Mr. Ceolin instigated Mr. Carvalho to incorporate Yellow Brick and asserts that there is no evidence to support such an allegation. Local 183 relies on Mr. Carvalho's testimony that, following negotiation of the sub-contracting clause, he was advised by builders that, if he wished to work with them, he would need an agreement with Local 183 or Local 1 and submits that it was as a result of such comments that he decided to incorporate a new company to enter into an agreement with Local 183. Further, Local 183 submits that it would have had no need

to encourage Mr. Carvalho to start a new company in order for Local 183 to obtain bargaining rights as Local 183 already had bargaining rights with respect to Sundial.

29. With respect to the allegation that Local 183 was aware of Mr. Carvalho's companies' pre-existing relationship with the Bricklayers when it entered into agreements pertaining to Yellow Brick and Sundial, Local 183 denies that such was the case. With respect to Sundial, the collective agreement was executed by Mr. Carvalho's partner and Local 183 had no knowledge that Mr. Carvalho was involved in Sundial until the commencement of the instant proceedings. With respect to Yellow Brick, Local 183 asserts that, when Mr. Ceolin executed the voluntary recognition agreement on behalf of Local 183 he did not associate Mr. Carvalho with Bayritz. The agreement was signed at a meeting where there were approximately 60 individuals representing 30 masonry contractors present. Over the previous year Mr. Ceolin had spoken with numerous contractors in the course of Local 183's drive to organize bricklayers, many of whom subsequently did not enter into an agreement with Local 183. Local 183 submits that it is entirely reasonable in the circumstances that Mr. Ceolin did not recognize Mr. Carvalho or associate him with Bayritz.

30. Local 183 submits that Sundial's execution of a collective agreement with Local 183 on July 20, 1992 was not a violation of the Act. Local 183 was certified to represent employees of Sundial in August 1991. Local 183 obtained a No Board Report in May 1992. Sundial was legally required to negotiate in good faith to achieve a collective agreement and, had it not executed an agreement, could have been subject to strike activity. In the face of a valid certificate and No Board Report, Local 183 submits that Sundial's execution of a collective agreement cannot constitute a violation of the Act.

31. As indicated above, Mr. Carvalho, aside from being called as a witness by the Bricklayers, did not participate in the hearing and accordingly took no position as to whether the Act had been violated as alleged by the applicants.

Decision

32. As our findings of fact set out above indicate, Mr. Carvalho incorporated Yellow Brick in order to enter into an agreement with Local 183 with respect to employees who, absent the incorporation of Yellow Brick, would have been represented by the applicants. As a result, Yellow Brick, through the actions of its owner, breached sections 65 and 68 of the Act. Mr. Ceolin did not suggest to Mr. Carvalho that he start up a new company but rather informed him that, as a result of the subcontracting clause, if he did not have an agreement with either Local 183 or Local 1 he would not be able to work in the residential sector of the construction industry. This was a statement of fact and was not a violation of the Act by Local 183 (see: *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022; *Masonry Contractor's Association (Toronto-Incorporated)*, [1978] OLRB Rep. Dec. 1123).

33. We have found that, at the time of executing the voluntary recognition agreement pertaining to Yellow Brick, Mr. Ceolin did not associate Mr. Carvalho with Bayritz. There is no other basis asserted on which Mr. Ceolin would have been aware that companies operated by Mr. Carvalho had a pre-existing relationship with the Bricklayers and accordingly we conclude that he was not so aware. With respect to Sundial, Mr. Carvalho's partner executed the collective agreement. There was no evidence to support a finding that, at the time of signing the collective agreement, Local 183 knew that Sundial was associated in any way with Bayritz. Accordingly, we find that Local 183 did not violate the Act when it entered into agreements with either Yellow Brick or Sundial.

34. Concerning the allegation that Sundial violated the Act when it entered into a collective

agreement with Local 183 on July 20, 1992 we find that it did not. We do not view the timing of the signing of this agreement as an indicator that Sundial only entered into the agreement to avoid the Bricklayers. As the facts set out above indicate, there is no evidence to suggest (nor is it alleged) that the incorporation of Sundial, or the subsequent certification of Local 183 to represent employees of Sundial, was in violation of the Act. Local 183 certified numerous contractors during the summer of 1991, Sundial being one of them. Local 183 pursued a No Board Report with respect to Sundial at the same time it sought No Board Reports with respect to approximately 40 other contractors. No Board Reports were obtained in May 1992. Fourteen days following the issuance of the No Board Report, Local 183 was in a position to commence a legal strike against Sundial. In the circumstances, we do not view Sundial's execution of a collective agreement with Local 183 on July 20, 1992 as a violation of the Act but rather as a natural consequence of the operation of the Act.

35. Accordingly, we find that Mr. Carvalho caused Yellow Brick to violate sections 65 and 68 of the Act when, in the face of the Bricklayers' existing entitlement to represent bricklayers and bricklayers' apprentices and stonemasons and stonemasons' apprentices of Bayritz in all non-ICI sectors of the construction industry, he caused the incorporation of Yellow Brick for the sole purpose of granting Local 183 voluntary recognition with respect to all employees of Sundial engaged in construction work.

36. The section 91 application is dismissed as against Local 183.

SECTION 1(4) AND 64 APPLICATION

Argument

37. The applicants submit that the responding parties in Board File No. 1424-93-R carry on associated or related activities under common control or direction within the meaning of section 1(4) of the Act. Section 1(4) provides as follows:

1.- (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

38. Mr. Carvalho acknowledged that all of the responding parties are engaged in performing masonry work in the ICI and residential sectors of the construction industry and that he is involved in the operation of all of the responding parties. He took no position with respect to whether the responding parties should be declared to be one employer for the purposes of the Act.

39. Local 183 acknowledges that the responding parties carry on associated or related activities under common control and direction within the meaning of the Act but asserts that the Board should exercise its discretion and refuse to grant a declaration with respect to Sundial on the basis of the Board's jurisprudence that indicates that section 1(4) should not be applied after bargaining rights have been obtained by another trade union (see: *Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029; *Al Smith Plastering & Partition Co. Limited*, [1981] OLRB Rep. Feb. 129; and *Hardrock Forming Company*, [1987] OLRB Rep. July 1003). Further, Local 183 submits that the Board should not issue a declaration with respect to Sundial as such a declaration would immediately create a conflict between Local 183 and the Bricklayers' established bargaining rights. Sundial would become bound by conflicting collective agreements with two unions involving the

same work and would be drawn into a jurisdictional dispute between them (see: *Hardrock Forming Company, supra*).

40. Counsel for the applicants argues that the considerations expressed by the Board in *KNK Limited*, [1991] OLRB Rep. Feb. 209 should cause the Board to reconsider the Industrial Mine Installations line of cases relied on by Local 183. Counsel argues that the Industrial Mine Installations line of cases were decided at a time when the Board typically determined whether to issue a related employer declaration by weighing the importance of preventing an erosion of bargaining rights against the prejudicial consequences of a declaration to the employer. Where the trade union had delayed in bringing the section 1(4) application, prejudice to the employer was assumed and the Board would typically exercise its discretion so as to refuse to issue a declaration. In counsel's submission, commencing with *KNK Limited*, the Board no longer equates delay with prejudice to the employer and places greater importance on preventing an erosion of bargaining rights. Counsel submits that *KNK Limited* stands for the proposition that the Board is now more concerned with preventing the erosion of bargaining rights and less concerned with the prejudicial consequences of a declaration to an employer. Counsel argues that the Industrial Mine Installations line of cases must be revisited with the Board's new focus in mind. Counsel relies on *Tri-County Contracting*, [1991] OLRB Rep. Dec. 1416; and *Square One Carpentry Inc.*, [1988] OLRB Rep. Oct. 1112.

41. With respect to the fact that a declaration would result in Sundial becoming bound to two overlapping collective agreements, counsel for the applicants suggests that, if the Board was to find that Sundial provided employer support to Local 183, the Board could declare Local 183's collective agreement to be null and void. If the Board is not inclined to declare Local 183's collective agreement to be null and void, counsel argues that the Board should not let the fact that its declaration would lead to jurisdictional disputes to cause the Board to refuse to issue a declaration. In counsel's submission, the fact that the Board is now able to handle jurisdictional disputes in an expeditious fashion significantly diminishes any prejudice which may be caused to the combined entity.

42. In response, counsel for Local 183 disputes that *KNK Limited* stands for the proposition advanced by the applicants. Local 183 argues that all the Board did in *KNK Limited* was re-examine the question of prejudice. Whereas the Board had previously been willing to equate delay with prejudice, commencing with *KNK Limited*, the Board said it will look to determine whether the union's delay *actually* resulted in prejudice to the employer. In counsel's submission, *KNK Limited* did not in any way alter the factors considered by the Board in determining whether to grant a declaration and *KNK Limited* should not cause the Board to deviate from the Industrial Mine Installations line of cases in which it was determined that a declaration will not usually be made where bargaining rights have been acquired by another trade union.

Decision

43. The Board has exercised its discretion and refused to issue a related employer declaration in circumstances where such a declaration would create a conflict with the established bargaining rights held by another trade union. The Board's reasons for such refusal are set out in *Industrial Mine Installations, supra*, as follows:

17. Such an application of the section might result in amending or revoking existing bargaining rights and upset many rights, duties and obligations that may have been resolved through private negotiation to the point where they have found their way into existing collective agreements.

And similarly in *Hardrock Forming Company*, *supra*:

17. More fundamentally, however, a related employer declaration with either Delform or Ilena would immediately precipitate a jurisdictional dispute. In effect, the combined entity would become bound by conflicting collective agreements with two unions involving the same work and Delform would be drawn into a jurisdictional dispute between them. That is a recipe for collective bargaining discord with we should not lightly condone; moreover, the Board has always been reluctant to make a "related employer" declaration when the effect is to create a conflict with established bargaining rights held by another union (See: *Al Smith Plastering and Partition Co. Ltd.* [1981] OLRB Rep. Feb. 129). Even assuming, without finding, that Hardrock and Ilena are related and that Delform is related to Ilena as well, (a doubtful proposition), we do not think that a section 1(4) declaration is warranted in the circumstances of this case.

44. As the above excerpts indicate, the Board does not typically grant a related employer declaration in circumstances where the employees of the second company are represented by another union at the time the section 1(4) application is made on the basis that such a declaration would result in conflicting bargaining rights and disrupt the established labour relations of the parties concerned. Such consequences are viewed as sufficiently prejudicial to cause the Board to exercise its discretion and refuse to issue a declaration.

45. In *KNK Limited*, *supra*, the Board remarked that, prior Board decisions dealing with the issue of whether the Board would refuse to issue a related employer declaration on the basis of the union's delay in bringing the application, had begun to inject fault on the union's part as a criterion for the exercise of the Board's discretion:

47. In determining whether a 1(4) declaration should be made, a number of Board decisions mention either "delay", or alternatively, what the union "knew or ought to have known". In effect, having ruled early on that section 1(4) was not an unfair labour practice provision requiring fault on the employer's part, the Board began to inject "fault" on the union's part as a criterion for the exercise of the Board's discretion. But a union could not be held "at fault" if it did not know what was going on, and in language reminiscent of that used under termination section 59 ("sleeping on its bargaining rights"), the Board turned to the further consideration of knowledge or constructive knowledge or what the union "should have known with due diligence". However, these decisions must be read with care, and in light of both statutory changes, and the Board's evolving jurisprudence.

46. The Board went on to set out a number of reasons why the Board must be very careful in linking the exercise of its discretion to the actual or presumed state of a union's knowledge during the period of delay including the fact that such an approach shifts the focus of the Board's enquiry away from the purpose of section 1(4) *and the prejudice flowing from the union's delay*:

52. How does the employer establish what the union "knew" or "ought to have known" where, as here, there was no express representation *from* the union, and no notice *to the* IBEW, that KNK was to be or had become Mr. Harvey's non-union successor to Agincourt? How does careful counsel establish "constructive knowledge"? By demonstrating circumstances from which the Board could reasonably infer that the trade union knew, "must" have known or "should" have known and acted upon, the facts upon which a section 1(4) application could be based. That is why we heard testimony about the size and prominence of the company's signs, where its trucks are parked, KNK's proximity to Buster's bar, the drinking habits of electricians, whether union officials were likely to be there, whether there was a KNK business card posted near the telephone which officials might have seen and connected to Mr. Harvey, Mr. Harvey's table talk, how often he was on a job site and in what apparent capacity, the number of union business agents available to do detective work, and so on. This focus on the union's behaviour leads inevitably to uncertainty and more protracted litigation, and shifts the focus from the purpose of section 1(4), the prejudice to a related employer if a declaration is granted, and how that prejudice is related, if at all, to conduct of that union. It is also difficult to harmonise with section 1(5) of the Act.

53. Section 1(5) was added to the regulatory scheme in 1975, and reflects a legislative presumption that a trade union will not know much about the internal arrangements of a business, despite the various means available to it, including the filings required by certain statutes regulating commercial activities. Any purported limitation on access to 1(4) relief based on the union's "due diligence" or knowledge, must take into account this legislative development. We fail to see how the Board in the exercise of its discretion can dismiss an application because it concludes that the union "should have known" or found out what the Legislature has quite clearly indicated a trade union will not be expected to know. And, again, those questions shift the focus from the purpose of section 1(4) and the prejudice to the employer if a declaration is made.

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55. The problem raised in this case, that was not addressed in *Stark, Faro Structural Steel, John Hayman* or *Capricorn*, is the actual *connection* between the union's knowledge or conduct, and the prejudice which KNK would suffer should a related employer declaration be made. What prejudice flows from the union's behaviour (delay, knowledge, etc.) which is not inherent in the declaration itself, whenever it is made? ...

47. As the above excerpt indicates, the Board determined in *KNK Limited* that delay, in and of itself, will not normally be sufficient to cause the Board to exercise its discretion to refuse to issue a declaration. Rather, the Board will focus on whether any *actual prejudice*, which is not inherent in the declaration itself, flows from the delay. In our view, *KNK Limited* does not stand for the proposition that, in determining whether to grant a declaration, the Board now considers the preservation of bargaining rights to be inherently more important than the avoidance of prejudicial consequences. We note that, in the relatively short excerpt from *KNK Limited* set out above, the Board refers to the Board's focus as being on the prejudicial consequences of a declaration no fewer than three times. We do not view the Board's determination in *KNK Limited* as warranting a revisiting of the Industrial Mine Installations line of cases.

48. In the present case, the applicants hold bargaining rights with respect to bricklayers, stonemasons and their apprentices employed by Bayritz in the ICI sector and in all non-ICI sectors within Board Area 8. The applicants also hold bargaining rights with respect to bricklayers, stonemasons and their apprentices employed by Dakota in the ICI sector and in all non-ICI sectors within Board Area 8 as well as all labourers in all non-ICI sectors within Board Area 8. Local 183 has bargaining rights with respect to labourers employed by Bayritz Masonry in all non-ICI sectors within Board Area 8 which, as explained above, appears to be understood by all concerned to be bargaining rights with respect to labourers employed by Bayritz Construction Ltd. Local 183 also holds bargaining rights with respect to all bricklayers, bricklayers apprentices and construction labourers employed by Sundial in all non-ICI sectors within Board Area 8. No trade union currently holds bargaining rights with respect to the employees of Yellow Brick.

49. If the Board was to declare Sundial and Bayritz to be one employer for the purposes of the Act a jurisdictional dispute would immediately arise as a result of Local 183 and the applicants' both possessing bargaining rights with respect to bricklayers and their apprentices employed by the combined entity in all non-ICI sectors of the construction industry within Board Area 8. Likewise, if the Board was to declare Bayritz and Dakota to be one employer, a jurisdictional dispute would immediately arise as a result of the understanding that Local 183 possesses bargaining rights with respect to the labourers of Bayritz and the fact that Local 2 possesses bargaining rights with respect to the labourers employed by Dakota. A similar dispute would arise if the Board was to declare a combination of the responding parties to be one employer which included both Sundial and Dakota as Local 183 holds bargaining rights for the labourers employed by Sundial and Local 2 holds such bargaining rights with respect to labourers employed by Dakota. It is clear that declar-

ing Bayritz to be one employer with Sundial and Dakota, either individually or in combination, would cause jurisdictional conflicts to arise.

50. The applicants suggest that the creation of jurisdictional disputes should not dissuade the Board from granting a declaration as such disputes can now be determined by the Board in an expedited fashion with much less cost to the Board or the parties. While it is true that the Board is now able to process and hear a jurisdictional dispute much more quickly than was the case in the past, litigating such disputes can still impose a considerable cost on the parties. Parties to a jurisdictional dispute are now required to file detailed briefs containing a statement of the issues in dispute including a detailed description of the work in dispute and the facts on which they intend to rely. Thus, a considerable amount of time must be spent by the parties preparing fairly lengthy and detailed pleadings. In addition, the parties are required to file multiple copies of the documents specified in the Board's Rules with the Board and all other parties. It is not unusual for the materials filed by each party to the dispute to comprise a number of bound volumes. The cost, in terms of the time and materials required to prepare an application or response, can be considerable. Thus, we do not accept that, the new statutory provisions and Board Rules which have considerably reduced the number of hearing days required in order to litigate a jurisdictional dispute, sufficiently obviate any prejudice caused by the creation of such disputes.

51. We would also observe that the result which the applicants seek is tantamount to a revocation of Local 183's certificate with respect to Sundial which was obtained as a result of a majority of employees expressing their desire to be represented by Local 183. In contrast, the representation rights asserted by the Bricklayers were obtained by voluntary recognition agreement such that, the employees' wishes concerning the Bricklayers acting as their bargaining agent, are unknown.

52. The applicants already possess bargaining rights with respect to Dakota and, in response to a question from the Board, indicated that a declaration with respect to Dakota would not serve any labour relations purpose. Accordingly, quite apart from the reasons expressed above, the Board would not issue a declaration with respect to Dakota.

53. In response to counsel's submission that, if Local 183's bargaining rights with respect to Sundial can constitute a bar to a declaration there is nothing to prevent an employer from avoiding a union's bargaining rights by simply setting up a new company and immediately voluntarily recognizing a new union, we would simply state that those are not the facts of this case as it concerns Sundial. We note, however, that Local 2 was a participant in similar conduct in the instant case when, four days following the Board's certification of Local 183 to represent labourers employed by Bayritz, proceedings in which Local 2 participated, Local 2 entered into a voluntary recognition agreement to represent, *inter alia*, labourers employed by Dakota.

54. In the unique circumstances of this case and given the relative quagmire of bargaining rights which have been acquired by Local 183 and the applicants with respect to employees of Bayritz, Sundial and Dakota, we are not persuaded that a section 1(4) declaration with respect to a combination of these entities is warranted. No trade union presently holds bargaining rights with respect to the employees of Yellow Brick. The parties to this application appear to consider Bayritz Masonry to be one and the same as Bayritz Construction Ltd. and have conducted themselves in this manner to date. No jurisdictional disputes would arise as a result of the Board declaring Bayritz Construction Ltd., Bayritz Masonry and Yellow Brick to be one employer for the purposes of the Act.

55. The application under section 1(4) of the Act is allowed in so far as it relates to Bayritz Construction Ltd., Bayritz Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick

Masonry. The application is dismissed as against Dakota Masonry Ltd. and Sundial Bricklayers Inc.

56. The applicants did not pursue its request for a declaration of a sale or transfer of a business. Therefore, insofar as this application relates to section 64 of the Act, it is dismissed.

57. In summary, having regard to the evidence and representations of the parties, the Board:

- a) declares that Bayritz Construction Ltd., Bayritz Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry constitute one employer for the purposes of the Act;
- b) declares that Bayritz Construction Ltd., Bayritz Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry are bound to the Provincial Collective Agreement between the International Union of Bricklayers and Allied Craftsmen and The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario;
- c) declares that Bayritz Construction Ltd., Bayritz Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry are bound to the collective agreement between the International Union of Bricklayers and Allied Craftsmen, Local 2 and Bayritz Construction Ltd.;
- d) declares that Bayritz Construction Ltd., Bayritz Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry have breached sections 65 and 68 of the *Labour Relations Act*.

58. The Board is not satisfied that any further or other relief is appropriate in the circumstances and, more specifically, the Board is not satisfied that this is a case in which it is either necessary or appropriate to order that notices be posted or otherwise distributed to employees.

59. On September 9, 1994, the applicants filed a request for reconsideration under section 108(1) of the Act. The circumstances in which the Board will generally reconsider a decision have been enunciated in numerous Board decisions (see: *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185; *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096). Generally speaking, the Board will not reconsider a decision unless: a party intends to introduce new evidence which could not previously have been obtained by reasonable diligence and such evidence, if adduced, would be practically conclusive; a party intends to raise objections or make representations not already considered by the Board which the party did not have an opportunity to raise previously; or the request raises significant and important issues of Board policy. The request for reconsideration filed by the applicants does not indicate an intention to adduce new evidence or make representation which have not already been considered by the Board. The request indicates that the applicants do not accept the Board's decision and feel that it was improperly reached. This, however, does not constitute grounds for reconsideration of the Board's decision. For the foregoing reasons, the request for reconsideration is hereby denied.

3583-92-R; 3584-92-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 222, Applicant v. Charterways Transportation Limited, The Corporation of the Town of Ajax, Responding Parties

Sale of a Business - Union alleging "sale of a business" where municipality cancelling its contract with transit company and "taking back" operation of municipality's transit system - Transit company found in earlier Board decision to be federal undertaking - *Labour Relations Act* amendments providing in section 64.1 that successor rights provisions applying to federal-to-provincial sales, but amendments coming into force only on January 1, 1993 - Respondents asserting that transaction occurred on December 31, 1992 and that section 64.1 of the Act having no application - Respondents also denying that transaction amounting to "sale of a business" - Board satisfied that by acquiring substantial part of work force previously employed by transit company, municipality transferring to itself an essential element of that business - Board concluding that municipality's hiring of employees on and after January 1, 1993 triggering sale and that section 64.1 of the Act applying to the transaction - Board finding and declaring sale of a business

BEFORE: *Roman Stoykewych*, Vice-Chair and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

APPEARANCES: *L. N. Gottheil*, *Gord Vickers*, *Simon Threlkeld* and *Susan Collins* for CAW Local 222; *L. Steinberg*, *B. Quistgaard* and *Paul Middleton* for London and District Service Workers' Union, Local 220; *Thomas A. Stefanik*, *Bill Heslop* and *Don Dewar* for Charterways Transportation Limited; *Richard J. Charney*, *Rick Parisotto* and *Terry Barnett* for The Corporation of the Town of Ajax.

DECISION OF VICE-CHAIR, ROMAN STOYKEWYCH AND BOARD MEMBER B. L. ARMSTRONG; October 27, 1994

1. This is an application pursuant to sections 1(4) and 64 of the *Labour Relations Act*.

I

2. Between 1977 and the events giving rise to this application, the responding party Charterways Transportation Limited (hereinafter "Charterways") had operated certain aspects of the public transit system of the responding party Corporation of the Town of Ajax (hereinafter "Ajax" or "the Town") pursuant to a contractual relationship. The applicant trade union, which had obtained bargaining rights with respect to employees of Charterways engaged in the performance of that contract, asserts that Charterways and the Town are common employers within the meaning of section 1(4) of the Act insofar as they exercise common direction and control over the operation of the transit system. In addition, the applicant union claims that the two responding parties have transacted a sale of a business as contemplated by section 64 of the Act by virtue of the Town cancelling its contract with Charterways and "taking back" the operation of the transit system. The respondents deny both allegations.

3. It is the thrust of the union's contention that the Town hired virtually the entire complement of workers engaged in its local bus service formerly managed by Charterways, then used those workers to drive the same buses, on the same routes to the benefit of the same customers without any interruption of service. In the union's submission, the Town has become a successor

employer under section 64 and 64.1 of the Act, with the result that the employees' right to union representation continues as well.

4. Interwoven into the merits of this application is the question of the constitutional status of Charterways. Although for many years it had operated its various business concerns throughout Ontario within provincial jurisdiction, including those in the Town, it was pleaded by Charterways, and supported by the Town, that Charterways was a federal undertaking by virtue of its regular inter-provincial activities carried on by some of its Branches and that, as such, it was not subject to the provisions of the *Labour Relations Act*. The question of the constitutional status of Charterways' operations in Ontario, including those in the Town of Ajax, was raised simultaneously in the context of a Ministerial reference before another panel of this Board. In order to prevent undue delay in the determination of the present application and to avoid the unnecessary duplication of litigation, it was determined that the present panel would proceed with the merits of the instant application, but that any decision it would render would be subject to the determination with respect to the constitutional status of Charterways. On that basis, hearings were held on various dates commencing August 3, 1993.

5. In the course of these proceedings, in a decision dated November 9, 1993, (*Charterways Transportation Limited*, [1993] OLRB Rep. Nov. 1125), the panel hearing the Ministerial reference determined that the operations of Charterways were a federal undertaking for constitutional purposes and that, therefore, its labour relations matters fell within federal jurisdiction. A hearing was held on November 29, 1993, to consider the submissions of the parties to the present application with respect to the status of the section 1(4) application in light of that finding. After considering those submissions, the present panel of the Board dismissed the application insofar as it related to section 1(4) of the Act. Under the circumstances of this case, it is clear that any order or direction that could be of practical significance to the parties would necessarily entail this Board assuming jurisdiction over the labour relations matters of Charterways, and thus, with respect to an entity over which this Board has no jurisdiction by virtue of the division of powers as contemplated by the provisions of the *Constitution Act*. Accordingly, the Board advised the parties on December 10, 1993 that it would no longer entertain the allegations concerning common direction and control pursuant to section 1(4). Thereafter, the scope of these proceedings was limited to those matters arising out of the applicant's claim that a sale of a business had been transacted as between Charterways and the Town.

6. Neither the Town nor Charterways maintained that the federal nature of Charterways' undertaking presented a constitutional bar to our making a determination with respect to the sale of business allegation. However, by virtue of the determination that Charterways was a federal undertaking, any "sale" that might have occurred must now be characterized as one transpiring as between a predecessor employer in federal jurisdiction and a successor employer that operates within provincial jurisdiction. This raised the somewhat recondite issue of the precise timing of the alleged transaction and more particularly, the question of the applicability of the newly-proclaimed provisions of section 64.1 (1) of the *Labour Relations Act*. That section came into effect as of January 1, 1993, and provides as follows:

64.1-(1) Section 64 applies with respect to the sale of a business when,

- (a) before the sale, collective bargaining relating to the business by the predecessor employer is governed by the laws of Canada; and
- (b) after the sale, collective bargaining relating to the business by the successor employer is governed by the laws of the Province of Ontario.

7. Both the Town and Charterways argued that the provision was of no assistance to the

applicant in this case because any transaction that may have occurred took place at some point in the evening of December 31, 1992. The respondents also argued that the provisions of section 64.1 (1) had no retrospective effect and applied only to “sales” that occurred after January 1, 1993. It was conceded by the union that prior to January 1, 1993, the statute did not contemplate a sale of business from a federal to a provincial undertaking. (See *Durham Transport* [1978] OLRB Rep. Sept. 818; *Municipality of Metropolitan Toronto* [1975] OLRB Rep. Oct. 777). However, the applicant based its claim as to the applicability of that provision on the ground that the triggering events took place on or after January 1, 1993 and, in the alternative, that the provision had retrospective effect so as to apply to the transaction before us.

8. Since the question of the applicability of section 64.1 (1) necessarily depends upon certain findings that are essential to our determination as to whether there was a “sale” pursuant to section 64 of the Act, we reserved our decision on that matter and render our reasons for ruling herein.

II

9. The Town of Ajax is a municipal corporation charged with the responsibility of administering the affairs of the Town of Ajax in the Regional Municipality of Durham, and in particular, of providing a transit system to the public. Pursuant to this charge, the Town has established a Public Transit Department, known as “Ajax Transit”, which provides to the public a regularly scheduled bus service. The scale of operations of the Ajax Transit system has expanded dramatically over the past twenty years, commensurate with the growth of the Town itself. It appears that in the mid-1970’s, the “system” consisted of two buses operating on a single route. By contrast, at the present time Ajax Transit operates twenty-two conventional buses over eight regularly-scheduled routes in or around the Town, as well as a “Handi-Trans” programme, in which four vehicles equipped for the needs of the elderly or persons with disabilities are operated on a dispatch basis.

10. At all relevant times the Town has owned the buses, bus shelters, bus stops and virtually all other tangible assets used in connection with the operation of the system. Since 1989, it has also owned the Transit facility in which those buses are garaged, cleaned and repaired. However, until the events which gave rise to the present application took place, the Town had never operated Ajax Transit directly. Instead, it has contracted for the provision of drivers, mechanics and cleaners who would operate the system. From 1977 to December 31, 1992, that contract was with the responding party Charterways.

11. Charterways Transportation Limited is a large transportation undertaking operating in Canada and the United States. The company provides its transportation services in a number of forms. By far the largest portion of its business consists of the provision of school bus services to local school boards. In this capacity, the company owns and operates approximately 2,500 school buses in Canada, and almost twice that number in the United States. As its name suggests, Charterways also operates bus charter services that are available to the general public, and for which at least a portion of its school bus fleet is utilized. Finally, Charterways is in the business of operating transit systems for municipalities on a contract basis. In Ontario, Charterways operates or has operated three such systems, one of which was for the Town of Ajax.

12. The company’s head offices in Canada are located in London, Ontario, but it has established numerous sub-offices, called “Branches”, throughout Ontario that are responsible for the day-to-day functioning of its various operations. Until 1993, Charterways’ Ajax Branch was involved in the school bus and charter as well as the transit aspects of its operations. With respect to the former, Charterways owns and operates approximately 100 school buses out of its own Ajax facility pursuant to contracts with the several Boards of Education in the Durham and Scarborough

regions, as well as with Ontario Hydro. To operate this system, Charterways employs, on a part-time basis, a large number of school bus drivers. The applicant has not obtained bargaining rights with respect to these employees and the operation of the school bus and charter service has not been substantially affected by the transactions giving rise to the present application. Accordingly, there is no claim with respect to bargaining rights as they may pertain to the employees in Charterways' school bus operation.

13. What the applicant seeks is a declaration from the Board that the bargaining rights it obtained with respect to the full-time conventional and Handi-Trans drivers and the mechanics and cleaners employed by Charterways in its Ajax Transit operations have survived the Town's termination of its contract with Charterways and the "take back" of the transit operations. Specifically, the applicant asserts that these rights now attach to the Town of Ajax. Initially, these bargaining rights were obtained in the form of three separate certificates granted by this Board to the applicant in April, May and June of 1990 with respect to the above mentioned employees. However, in a subsequent collective agreement, which came into effect as of September 1, 1990, Charterways recognized the applicant as the bargaining agent for those employees in a single combined unit. As well, Charterways recognized the union as the bargaining agent "for any expansion of existing facilities in which work performed that is related to the mechanical maintenance and/or drivers of the Ajax Transit system located in the Province of Ontario". By all accounts, the collective bargaining relationship between the applicant and Charterways although brief, had been a harmonious one.

14. The provision of the transit service to the Town by Charterways was regulated by a series of two-year contracts commencing in 1977. Initially, the contractual arrangement dealt only with the provision of a "conventional" bus service that was, as indicated, relatively modest in scale. However, over the years the scope of the operation not only expanded substantially, but by 1991, also included a separate, parallel arrangement for the provision of the Handi-Trans service. Although the specific terms of these rather complex and detailed agreements were modified from time to time, the essence of the arrangements remained the same: the Town supplied its fleet of buses, buildings, bus stops, signs, ticket and payment systems and schedules, while Charterways, on the basis of an hourly rate of actual operation, provided and co-ordinated a complement of trained drivers to operate the buses, and a group of mechanics and cleaners to maintain and repair the fleet. Charterways was also required to provide spare repair parts and fuel for the operation of the buses on an ongoing basis, for which they were reimbursed according to an arrangement set out in the agreement.

15. Initially, the agreement stipulated that the Town's buses would be garaged, repaired and maintained in Charterways' Ajax facility, out of which it also operated its school bus fleet. However, in December 1989, this arrangement was altered with the opening of the Town's own Transit Facility. At that time the transit operations of Charterways were transferred to the Town's facility at 110 Westney Road in Ajax. In operational terms, this meant that Charterways' "Transit Supervisor", who had "hands on" responsibility over the day-to-day co-ordination of the transit aspect of its business, and the drivers who operated the buses, now worked in or out of the Town's Transit Facility. In addition, Charterways' Maintenance Supervisor, and the four Charterways mechanics whose work he oversaw, now performed their work out of the Town's facility. The maintenance supervisor, however, was stationed at the Town's facility only on a part-time basis as he split his attention between the supervision of the mechanics and cleaners at the Transit Facility and of those at Charterways' remaining school bus operations. Finally, Charterways deployed a part-time dispatcher at the Ajax facility. However, Fred Thompson, the General Manager of the Ajax Branch of Charterways, whose responsibilities included both the transit and the school bus operations, was not stationed at the Town's Transit facility. Although a frequent visitor to the

Town's transit facility as the company's liaison person with the Town, and although he was the Charterways official responsible for the performance of the contract, he retained his office in the Charterways facility.

16. A review of the terms of the contract, which the evidence disclosed were substantially complied with and was operated on an arm's length basis, reveals that the Town retained a considerable degree of control over the operation of the transit system. Primarily, this aspect of the relationship was played out between Fred Thompson and Terry Barnett, the Town's Director of Transit. Barnett was Thompson's counterpart as the liaison person for the Town with respect to the performance of the contract. Barnett, who testified on behalf of the Town, was also the Town official ultimately responsible for the operation of Ajax Transit, and was actively involved in the operations of that enterprise. The extensive evidence of his activities revealed that his "hands on" managerial style meant that there were few aspects of the operation of Ajax Transit that did not bear his personal imprint, and that as a result, Ajax Transit was very much a creature of the Town. Thus, although the contract states rather generally that Charterways was to provide the Town with a "public bus transportation system", as a matter of practise the Town retained virtually complete control over the kind, number and appearance of buses that it would provide to Charterways; the routes and schedules pursuant to which the system would operate; the rates and method of collection of fares, including the introduction of new technology in this respect; the regimen and standards of repair, maintenance and cleaning of the fleet of buses, including the qualifications of the mechanics that were to perform the work; the nature, size and appearance of advertising that would appear on the buses; and other sundry details of the operation of the transit system. Certainly as far as the public was concerned, Charterways had no visible presence in the operation of the system: the buses all bore the logos or other identification of "Ajax Transit"; the drivers were required to dress in uniforms that, although belonging to Charterways, identified them as drivers of Ajax Transit; and all informational material provided to the public of course identified the system as that of Ajax Transit or of the Town of Ajax.

17. For its part, Charterways' principal function under the arrangement was to recruit, hire, train, discipline, schedule and otherwise deploy an appropriately skilled complement of drivers, mechanics and cleaners. This personnel function was an important exception to the otherwise substantial control of the system exercised by the Town and was an area in which Charterways demonstrated a substantial degree of independence. Although according to the terms of the contract the Town could specify that drivers were to be, among other things, "polite and well-groomed at all times", and exhibit such salutary characteristics of bus drivers as maturity, emotional stability, courtesy, self-discipline, and honesty, it was in the field of recruitment and deployment of a skilled transport work force that Charterways exercised its entrepreneurial initiative and contributed its particular expertise.

18. In this respect, the evidence reveals that the large majority of the drivers, mechanics and cleaners working in the transit portion of its Ajax operations were recruited from other aspects of Charterways' organization, including the school bus service in Ajax, and were selected, trained and their employment relationship administered according to methods and procedures established by Charterways. The complement of employees assembled over the years by Charterways to operate the Ajax Transit system exhibited a considerable degree of continuity, as is evidenced by their substantial seniority in both the Charterways system and with Ajax Transit itself. Upon reviewing the evidence, we are satisfied that this element of continuity was crucial to the proper operation of the transit system. In this respect, it is noteworthy that the importance of an identifiable and continuous work force is reflected in the terms of the contract between Charterways and the Town. Thus, one of the obligations that Charterways undertook in the operation of the system was that "the same vehicle operators will be regularly assigned to the Transit System to ensure route famil-

ilarity, system continuity, and allow passenger recognition.” As we noted earlier, the terms of the contract were substantially complied with. To similar effect, Terry Barnett conceded in his evidence the importance of the driver recognition factor, allowing that the goodwill resulting from driver recognition would serve to maintain, if not increase, ridership. More generally, it is clear that Charterways considered its driver complement collectively as an essential asset in the operation of its business as it related to its transit operations. Indeed, the Vice-President of the Canadian Division of Charterways, characterized the Charterways work force as a group of “highly qualified professionals” that was the product of considerable investment in terms of training both by Charterways and, indirectly, by the Town itself.

19. The decision to build its own transit facility signalled the first step in the Town’s long-range plan to “take back” the operation of its transit system - a matter that was repeatedly characterized by Barnett as a “natural progression”. Stripped to its essentials, it became increasingly clear to the Town that, with the growth in size of the transit system, it could operate the system more economically by itself than it could by utilizing a contractor to supply its work force. The “take back” process was given considerable impetus in early 1992 when the Town voiced its dissatisfaction over the implementation of the rate increases set out in the contract with Charterways, and more particularly, upon Charterways’ refusal to “voluntarily” forego these increases in the ensuing discussions. Ultimately, after several months of negotiation that bore no tangible results as far as the Town was concerned, Town Council voted on July 20, 1992 to terminate the contract with Charterways as of December 31, 1992 and to commence the operation of the system on its own as of January 1, 1993. Even at that point, however, the matter was far from settled, and it was not until August 26, 1992 that the employees of Charterways received notice that their employment would not be continued beyond the termination of the contract with the Town.

20. The task of preparing for the “take back” of the operations commenced in earnest by the fall of 1992. Given that the Town already had in place the material and, in many respects, the organizational elements of the transit system, the decision to run the transit system without the assistance of the contractor did not involve a significant alteration of the method of operation. Indeed, it appears that from the outset, it was the intention of the Town to alter as little as possible in terms of the operation of the system. In this respect, the evidence indicates that the transition from Charterways to the Town would have scarcely been noticed by the general public. Terry Barnett remained firmly in charge of the Ajax Transit organization. To replace the managerial and supervisory functions previously performed by Charterways personnel, the Town created a new managerial position in Ajax Transit, and hired Ron Roffey to fill it. Roffey, who had previous experience with neither the Town nor with Charterways, commenced his employment in mid-December. In addition, the duties of the Transit Facility’s Office Manager were now expanded so as to include certain of the duties previously performed by Charterway’s Transit Supervisor.

21. By far the most significant transitional activity engaged in by the Town was the recruitment of a work force to operate the transit system. It appears that Charterways, upon the extinction of its transit operations in Ajax, had no comparable employment to offer to its complement of employees working on its Ajax Transit contract. Although it was open for those employees to apply for the part-time jobs in the school bus service, Charterways itself recognized that this was an unacceptable option given the substantially inferior terms and conditions of employment prevailing there. In any event, it appears that few if any of the former Charterways drivers engaged in the Transit aspect of its operation remained with the company after the termination of the contract with the Town.

22. For its part, the Town was of the view that it was under no obligation to keep on the employees formerly employed by Charterways. It was Barnett’s evidence that it was the intention

of the Town to operate the Transit system on a union-free basis and to hire entirely on the basis of "merit". In this respect, he stated that although the former employees of Charterways were free to apply for positions with the Town, no "preferential treatment" would be accorded them in the open competition for the positions.

23. However, the evidence is clear that the matter of previous employment with Charterways was far from being a matter of indifference to the Town. Notwithstanding Barnett's claims that the Town was, in effect, assembling a "new" work force, both the process by which the Town's employee complement was staffed and the result of the hiring process point instead to substantial continuity. Thus, contrary to the Town's human resources policy concerning hirings, the former drivers of Charterways were given special advance notice of the competition for the "new" positions. To similar effect, although the hiring process was nominally under the direction of the Town's Human Resources Department, the evidence revealed that the hiring was accomplished as a matter internal to Ajax Transit and that former employees of Charterways previously engaged in the supervision and training of drivers were retained by the Town, at least temporarily, to assist in the hiring process.

24. Most striking of all, however, is the result of the hiring process, in which the Town retained a large majority of the former Charterways employees utilized in the operation of the Transit service. Thus, of the 12 full-time conventional drivers hired by the Town, nine (seven in a full-time capacity, and two in a part-time capacity) had previously worked for Charterways on its Ajax contract. Of the 13 part-time drivers hired by the Town, only two were from the "outside", the remainder being former Charterways drivers. In the case of the Handi-Trans service, all five drivers, including three full-time and two part-time, were retained. In total, of the thirty drivers hired by the Town, twenty-three, or almost four-fifths of its "new" operator complement, previously performed that work for Charterways on its Ajax contract. Cleaners and maintenance personnel hired by the Town exhibited a similarly high degree of success in obtaining jobs with the Town: two full-time mechanics and one part-time cleaner hired by the Town were previously employed by Charterways in its Ajax Transit operations; only one full-time cleaner was hired from "outside". These employees, along with the small number hired from "outside", were all given offers of employment that was to commence on January 1, 1993. The evidence revealed that the hirings were confirmed by Town council later in January. In sum, although the Town did not retain the entirety of the complement of employees previously employed by Charterways to perform its contract with Ajax Transit, we are nonetheless satisfied that what was retained was a substantial majority of them and that they constituted an identifiable, core group.

25. However, the Town retained virtually no other aspects of Charterways' business. In contrast to the complement of drivers, mechanics and cleaners which, as indicated, was in substantial part retained, none of Charterways' managerial and little of its supervisory staff engaged in the performance of work at Ajax Transit remained with the Town upon the completion of the contract. In effect, the organization operating the transit contract in Ajax was disbanded by Charterways, and its managerial personnel was assigned elsewhere. Thus, Sherry Strong, the Transit Supervisor responsible for the day-to-day co-ordination of the transit operations, remained an employee of Charterways albeit in another capacity. Fred Thompson, the General Manager of the Ajax Branch, was redeployed to manage another Charterways Branch. As indicated above, in their place the Town hired persons from outside the Charterways organization to perform their functions. Nevertheless, certain parts of the Charterways supervisory complement remained intact in the Town's operations: the Town retained the services of Les Rae as supervisor of mechanics and Jack Kennedy as part-time dispatcher. Both had performed similar functions for Charterways.

26. Similarly, the Town retained little or none of the tangible assets owned by Charterways

since, as we noted above, virtually all the assets utilized in the operation of the Transit system were not only owned, but were substantially controlled by the Town throughout the duration of the contract. Provision was made to reconcile fuel accounts, tools and other operational items on a detailed and arm's length basis. Aside from a few pieces of furniture which it used in the Transit facility, and the uniforms worn by the drivers, Charterway's transit operations appeared to require the ownership of very few tangible assets. In any event, both the furniture and the uniforms were retained by Charterways upon the termination of the contract.

27. As indicated earlier, Charterways' contract with the Town expired on December 31, 1992, and although there was substantial dispute in the evidence as to a purported "early termination" of the contract, it is clear that Charterways wound up its operations at the conclusion of the bus services that evening. Final fuel levels were reconciled, a dispute concerning parts inventory was deferred, and the sundry details relating to the termination of Charterways' activity appear to have been completed in the evening of December 31, at which time Charterways vacated the Town's facility. Although the Town engaged two persons to perform a special New Year's Eve service that evening on a casual basis, regular operations, utilizing the complement of drivers it had hired, commenced the next day. To the general public unaware of the termination of Charterways' contract, there would be no noticeable difference in the operations. Similarly little change would be appreciated from the perspective of the employees: substantially the same drivers would be performing the same work to achieve the same purpose within the same transit system, albeit for a different employer and under a different supervisor. Under these circumstances, the trade union claims, the Town has transferred to itself a part of Charterways' business.

28. The question before this Board, then, is whether in these circumstances the Town's acquisition of the employee complement formerly engaged by Charterways is sufficient to trigger the "sale" provisions of the Act.

III

29. Section 64 of the Act reads in relevant part:

64.(1) In this section,

"business" includes one or more parts of a business; ("entreprise")

"predecessor employer" means an employer who sells his, her or its business; ("employeur précédent")

"sells" includes leases, transfers and any other manner of disposition; ("vend")

"successor employer" means an employer to whom the predecessor employer sells the business. ("employeur qui succède")

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

(2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:

1. A proceeding before the Board under any Act.

2. A proceeding before another person or body under this Act or the *Hospital Labour Disputes Arbitration Act*.
3. A proceeding before the Board or another person or body relating to the collective agreement.

(2.2) If the predecessor employer has given or been given a notice relating to bargaining for a collective agreement or has requested the appointment of a conciliation officer or mediator, the successor employer is considered to have given or been given the notice or to have made the request, until the Board declares otherwise.

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

30. The Board has long recognized that the purpose of the “sale of business” provisions in the Act is to provide a degree of stability to a trade union’s bargaining rights upon the change of ownership of an undertaking. The successorship provisions of the Act were initially utilized primarily with respect to “paper transactions” engaged in for the purpose of eliminating trade union bargaining rights through a change in the identity of the employer. However, the Board has long recognized the further important collective bargaining purpose served in preserving trade union bargaining rights through the various legitimate transactions entailing a change in the identity of the employer (*Aircraft Metal Specialities* [1970] OLRB Rep. Sept. 702; *Marvel Jewellery Limited* [1975] OLRB Rep. Sept. 733). The concerns towards which the successorship provisions were addressed, and the labour relations purposes they serve, were set out fully in *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193:

In the absence of a successor rights provision any change in the legal identity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in partnership, would all effect a change in “the employer” even where the plant equipment, products and work force remain substantially the same. The employees might find themselves working at the same plant, at the same machine, under the same working conditions, with the same supervision, doing exactly the same job as they did before, but as a result of a transfer (of which they may not even be aware) their collective bargaining rights and their collective agreement would disappear. Section 55 [now 64] avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining *status quo* by transforming the institutional rights of the union and the individual rights of the employees, (both of which are grounded in the statute) into a form of “vested interest” which becomes rooted in the business entity, and like a charge on property, “runs with the business.”...

The concept of successorship is an attempt to balance the interests and expectations of parties in the industrial community and preserve both collective bargaining stability and industrial peace. The employer retains his freedom to dispose of all or part of his business; but it is recognized that one cannot realistically expect that the interest of employees will be at the forefront of his negotiations. On the other hand, his employees may have recently struggled to become organized or to achieve a collective agreement. They expect that their statutory right to bargain collectively and their negotiated conditions of employment will have some permanence. Their expectations would be frustrated if a transfer of the business terminated both. Of course, the transfer of the business is not the only occurrence which could frustrate employee expectations. A re-organization of the production process, the introduction of “job destroying” technological change or a geographic move beyond the scope of the collective agreement will materially change the industrial relations *status quo*. A business transfer, however, involves a new employer and raises legal problems of an entirely different order which cannot be easily accommodated in bilateral bargaining processes. It is to these problems that section 55 [now 64] is addressed.

31. A collective bargaining *status quo* is preserved upon a sale of an employer's business by statutorily transforming the bargaining rights that had previously been defined with respect to the employees of a particular employer so that they now attach to a "business" entity. In analyzing the circumstances of the alleged sale, the Board pays particular attention to elements of continuity between the predecessor's and successor's business. In that respect, the Board has found it useful to "trace" the elements of that business to ascertain whether they have been transferred to the purchaser so as to constitute a transfer of at least a part of the business. The matter is one of characterization of fact and in that respect, the Board has made it very clear that what constitutes the sale of a business under section 64 of the Act is not a matter for which there is a single decisive test. In recognition of the great diversity of commercial affairs, the statute does not contemplate an exhaustive definition of the term "business" and the breadth of the definition of "sale" similarly bespeaks the need for a case by case elaboration of the term in light of labour law policy. The Board commented in *Culverhouse Foods Ltd.* [1976] OLRB Rep. Nov. 691 that although the range of such elements is potentially endless, the principal focus of the Board's inquiry is to determine whether there has been a continuation of all or part of the business:

In each case the decisive question is whether or not there is a continuation of the business... The cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trade mark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessors have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life on its own; none will necessarily determine the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e., whether there has been a continuation of the business.

32. While the potential indicia of a sale may well be endless, the Board places considerable reliance upon the specific commercial context in which conclusions regarding the sale of a business are made, and emphasizes that it should not disregard the fundamental differences in the various contexts in which the successorship issue arises. In *The Tatham Co.*, [1980] OLRB Rep. Mar. 366, the Board stated:

Factors which may be sufficient to support a "sale of a business" finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets - physical plant machinery and equipment - may be of paramount significance; while in others it may be patents, "know-how", technological expertise or management skills which will be significant. Some businesses will rely heavily upon the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, retail and service sectors, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section [64] must be applied in a manner which is sensitive to the business context and the purpose which the section is intended to accomplish.

33. As noted above, the Act must be applied to all sectors of the economy equally, and in that respect, the Board must be sensitive to the evolution of forms of business organization, particularly in the service industry, which utilize few, if any, tangible assets. In this regard, the Board has frequently expressed its view that in undertakings in the service sector, such goods as managerial

systems, “know how” or other intangibles are of greater importance than the presence or absence of a particular configuration of physical assets. (see, e.g., *Charming Hostess*, [1982] OLRB Rep. Apr. 536; *Toronto College Street Centre* [1986] OLRB Rep. June 913.) For example, in the *Toronto College Street Centre* case, the Board found that a sale of a business has transpired in the absence of the transfer of any material assets. What was transferred in that case were “intangible” assets such as operational and managerial systems, and, it is important to note, the complement of employees.

34. The factor of continuing employment of the predecessor’s employees has presented the Board with certain pragmatic difficulties, since it is a factor that is frequently in the hands of a potential successor who may wish to defeat the trade union’s claim of successorship. For obvious reasons, the Board is reluctant to ignore potentially relevant indicia of continuity, while at the same time is loath to reward conduct that seeks to undermine the purposes of the Act. Accordingly, it is the Board’s policy to consider continued employment as a factor in assessing the continuity of a business, but not to take into account the failure of the alleged successor to rehire the employee complement. (*Gordon’s Markets*, [1978] OLRB Rep. July 630; upheld November 21 1978 (Ont. Div. Ct.) unreported.) Thus, the Board has frequently adverted to the importance of the retention of the skills, expertise and specific identity that resides in the employee complement in making its assessment of whether a transfer has occurred. (*Culverhouse Foods Ltd.*, *supra*; *Metropolitan Parking*, *supra*; *Beef Terminal* [1980] OLRB Rep. Aug. 1167) Particularly in the context of the “key man” cases, the Board has frequently found that the identity of a business is so closely linked to the skills and experience of a particular manager or employee such that his or her retention by the alleged successor is of prime importance in determining whether a sale of part of a business has transpired. (See, for example, *Gallant Painting* [1991] OLRB Rep. Sept. 1051; *Ably Concrete Floor Limited*, [1991] OLRB Rep. May 579.)

35. What constitutes the “business” that is alleged to have been transferred is critical to a determination under section 64 of the Act, since it is only to a “business” that bargaining rights attach. Aside from providing that a business includes a “part” of a business, the statute offers little guidance, and the matter of definition has been left to the Board. At a general level, the Board will assess whether what has been transferred is the whole, or coherent organizational part, of a “functional economic vehicle”. Once again, this is a matter of factual determination, dependent on the specific commercial context in which the transaction occurs. Thus, in instances where the organizational or goodwill elements of a business are its essential features, the Board will not attribute great significance to the transfer of the tangible assets from one entity to the other; conversely, where a tangible asset or some other “good” is the defining feature of a business, its passage from one employer to the next may well constitute the sale of “part” of a business notwithstanding that no other element of the predecessor business has been transferred. (*Accomodex Franchise Management Inc.* [1993] OLRB Rep. April 281.)

36. Although the distinction may frequently be difficult to draw, a “business” is in this respect to be set apart from the work performed by its employees: both the Board and the Courts have reasoned that the general statutory scheme of granting trade unions bargaining rights with respect to employees of employers, and, in turn, the specific language of the sale of a business provision in which rights attach to the “business” entity militates against a finding that the rights attach to the work that is performed. (*Syndicat national des employees del la Commission scolaire de l’outaouais (CSN) v. Union des employes de service local 298 (FTQ)*, *Bibeault et al* [1988] 2 SCR 1048; *British American Bank Note Company* [1979] OLRB Rep. Feb. 72; *Metropolitan Parking*, *supra*; *Parnell Foods Limited* [1992] OLRB Rep. Dec. 1164.) The distinction between a “transfer of a business” and a “transfer of work” has been extensively examined by the Board in *Metropolitan Parking*, *supra*, and more recently, in *Parnell Foods*, *supra*, and little would be

gained by recapitulating that analysis here. It is sufficient to note that although the Board may consider whether similar work is being performed as a factor in determining whether or not there has been a sale, where the Board is satisfied that what has been transferred as between two employers is principally a right or opportunity to perform certain work, the Board will normally conclude that a “business” has not been transferred. In that respect, the mere fact that the same work is being performed by another employer does not determine that there has been a sale of a business. (See, for example, *Metropolitan Parking*, *supra*; *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923.) Instead, in order to trigger the sale provisions of the Act, the Board must satisfy itself that a particular economic organization, or part thereof, in the form of a configuration of assets, organizational capacity, or some other “intangible” good that is an essential characteristic of one business has been transferred from one entity to another.

IV

37. It was the argument of both the Town and Charterways that no such transfer had occurred in the present application. Relying upon such cases as *Metropolitan Parking*, *supra*, *Charming Hostess*, *supra*, and *City of Stratford*, *supra*, it was argued strenuously that the Board should not find that a sale of a business has occurred between Charterways and the Town because what has been transferred was only “work”. By terminating the contract, and in the absence of a transfer of material assets or the incorporation of the organizational capacity of the predecessor, it was argued that what was effected was a mere reversal of the contracting-out of work. Thus, the “take back” effected by the Town did not involve the transfer of any “going concern” previously owned by Charterways, but at most, the retrieval of a work opportunity that was previously performed by an economic organization assembled by Charterways. At the conclusion of the contract, Charterways merely “lost business” in the colloquial sense; it did not effect the transfer of a business as contemplated by the Act. It was argued that the mere fact that the work is essentially identical, and that it happened to be performed by some, but not all of the employees previously employed by Charterways, does not change the fact that the “business” in which Charterways was engaged did not transfer to the Town.

38. The Board agrees that the principles that have been developed for a determination of whether a sale has occurred in the contracting out context are of significant assistance to it in the examination of a take back (*Toronto College Street Centre*, *supra*). Further, there can be little doubt that bargaining rights attach to the “business” entity upon a sale, and not merely work. Nevertheless, it is equally clear that the adoption of the legal form of contracting out of work does not insulate transactions from the operation of the sale of business provisions of the Act. The Board has made it clear that it will scrutinize the substance of a transaction, whether it be characterized as a contracting out or otherwise, to determine whether there has been a transfer of an essential element of the predecessor’s business organization, and whether that element, in turn, forms an integral part of the successor’s operations. As the Board emphasized in *Metropolitan Parking*, *supra*, a transaction adopting the legal form of “contracting out”, although inherently entailing the transfer of work, may nonetheless involve the sale of a business:

The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work or services performed by A’s employees within A’s organization are “contracted out” to B, and B uses his own managerial skills, plant and equipment and “know how” to supply to A, for a price, the product, services, facilities or components formerly produced by A’s employees. A, therefore, is contracting for the use of B’s economic organization in lieu of his own. A is generating a particular demand, or market, for B’s product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind of symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship between the two parties is implicit in subcontracting and does not, in itself, establish the transfer of all, or part, of a business. *If it is clear on the*

evidence, however, that B is unable to fulfill A's requirement's with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section [64] is triggered by "part of a business") or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrate or foreclose the application of section [64] (or 1(4)). If however, "but for" the transfer of such assets, licenses, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business - albeit a part which A no longer wishes to operate itself.

[emphasis added]

39. In numerous instances, the Board has determined that, notwithstanding that the transaction took the legal form of a contracting out, a sale of a business had taken place because the alleged successor employer also had transferred to it an essential aspect of the predecessor's business. (*Culverhouse Foods Inc.*, *supra*; *Thunder Bay Ambulance Services*, [1978] OLRB Rep. May 467.) In *Parnell Foods*, *supra*, for example, the Board was satisfied that a sale had taken place in a contracting out transaction where the predecessor had transferred, along with the work that was to be performed, some of the essential organizational elements of the undertaking that would otherwise be unavailable to the successor.

40. In the context of the present application, it is crucial to note that the "business" in which Charterways was engaged was not the provision or operation of a bus service. Although that position was urged upon us by the trade union, the facts disclose that the substantial elements of the business so described remained at all times within the Town's ownership and control. Instead, the scope of the business engaged in by Charterways' was much narrower, and particularly by the time of the events giving rise to the application, consisted primarily of the provision of a skilled work force to the Town.

41. Charterways' business insofar as it related to Ajax Transit was carried on as an organizationally distinct branch that in turn, was further sub-divided in operational terms because of the Town's requirement that the Transit operation be run out of the Town's facility. Although the operation of the business entailed the application of managerial and organizational systems, the business was primarily carried on through the utilization of an identifiable employee complement skilled in the operation of the Ajax Transit System that, through its efforts over the years, it had recruited, trained and co-ordinated. Particularly bearing in mind the operational requirement that the employee complement remain stable, the work force engaged by Charterways can be considered its most valuable asset. Given its centrality to its operation, then, we conclude it constituted a distinguishing "part" of its business.

42. By virtue of its acquisition of that employee complement in a substantially similar form, the Town gained possession of the distinguishing feature of Charterway's business. Furthermore, we are satisfied that the employee complement continued to serve the same integral function in the operation of Ajax Transit once that system was run by the Town in its entirety. In contrast to the relatively unskilled work force in *Metropolitan Parking*, whose particular identity was at best a matter of indifference to the alleged purchaser, in the present application the employee complement, given its specific composition that is linked to the operational requirement for continuity, constituted an integral feature of Charterway's transit business in the Town of Ajax and, upon the termination of the contract, essential to the continued operation of Ajax Transit. The evidence is clear that the Town wished to operate the system in much the same manner as previously, and in

the context of the particular commercial context, the continuity of the employee complement played a significant role in achieving that goal. We note that the Town solicited the applications of these employees, and, given their experience and the importance of continuity for the operation of the transit system, it is hardly surprising that a substantially unchanged employee complement emerged from the open competition for the jobs. Thus, the Town, by hiring the employees formerly engaged in the operation of the transit system, “took back” significantly more than it initially contracted out: what might well have been, in the words of *Metropolitan Parking*, a “simple contracting out” in 1977 constituted a transfer of a part of Charterways’ business upon the contract’s take back since it entailed an incorporation of an element of the previous employer’s organization that was essential to the continued operation of the transit system.

43. In summary, we are satisfied that by acquiring the substantial part of the work force previously employed by Charterways to perform its obligations under its contract with the Town, the Town transferred to itself an essential element of that business. Consequently, we conclude that in so doing, Charterways and the Town have transacted a sale of part of a business within the meaning of section 64 of the Act.

V

44. Finally, we are satisfied that the provisions of section 64.1 (1) have application to that sale since the Town acquired the capacity to utilize the employee complement formerly employed by Charterways only as of January 1, 1993. Although it may be that Charterways’ role in the operation of the system was completed by the evening of December 31, 1992, the evidence is clear that the members of the employee complement did not commence their employment with the Town in any sense until January 1, 1993. In this respect, it is important to note that it is the hiring of the employees previously employed by Charterways, rather than the taking over complete control of the transit system, that triggered the sale.

45. Considerable argument was directed to the fact that Charterways retained two employees to operate a special New Year’s Eve service. However, we cannot accept that the use of two drivers on a casual basis on the evening of December 31, 1992 was sufficient to trigger a sale under the provisions of the Act. Moreover, it is to be noted that these drivers were not thereafter retained by the Town as part of its regular driving complement, but instead, were placed on a casual list of drivers that, in any event, became effective January 1, 1993. Furthermore, in light of our determination that the transfer of the employee complement constituted the triggering event of the sale, it is unnecessary to determine the precise time at which Charterways’ contract with the Town expired nor is it necessary to address the question of the retrospective application of section 64.1 (1).

46. Accordingly, we are satisfied that the sale took place on or after January 1, 1993, and that, therefore, the provisions of section 64.1 (1) apply to that transaction. As a further result, we find that the Board has jurisdiction with respect to a sale of a business as between Charterways, whose collective bargaining matters are governed by the laws of Canada, and the Town, whose collective bargaining matters are governed by the laws of Ontario.

47. Having regard to the foregoing, the Board finds that there has been a sale of a business as between Charterways and the Town within the meaning of section 64 of the Act and we so declare. Under the circumstances, which include the parties’ request that we take no remedial action beyond a declaration of a sale, we find it appropriate to make no further declaration or order at this time. We remain seized with respect to any issues that may arise out of our finding that a sale has taken place.

48. The reasons for Board member Shamanski's dissent in this matter are unavailable at this time and will follow in due course at which time they will be distributed in the same fashion as the instant decision.

3770-93-R Ensign Security Services Inc., Applicant v. United Steelworkers of America and Canadian Security Union, Responding Parties v. Pinkerton's of Canada Limited and Burns International Security Services Limited, Intervenors

Sale of a Business - Successor security company contracting to provide services at three locations where employees already represented by USWA - Successor having collective agreement with CSU including municipality-wide bargaining unit - USWA and CSU each asserting bargaining rights at the three locations - Board exercising authority under section 64(6) of the Act and declaring that employees at the three locations bound by collective agreement between successor and CSU

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Brian P. Smeenk* for Ensign Security Services Inc.; *Robert Healey* for United Steelworkers of America; *Bernard Fishbein* for Canadian Security Union and Canadian Union of Professional Security Guards; *Richard Nixon* for Burns International Security Services Limited and the Association of Professional Security Agencies.

DECISION OF LEE SHOULDICE, VICE-CHAIR, AND BOARD MEMBER, R. M. SLOAN;
October 25, 1994

I. Introduction

1. This is an application brought pursuant to sections 64 and 64.2 of the *Labour Relations Act* (hereinafter "the Act"). This application raises for consideration the labour relations consequences when a contract for services changes hands in the security guard industry, in circumstances where both the successor and the predecessor employers are subject to municipal-wide bargaining relationships with different trade unions. The applicant (hereinafter "Ensign") is the successor employer at three separate work sites in the Regional Municipality of Ottawa-Carleton; the responding parties Canadian Security Union and United Steelworkers of America (hereinafter "C.S.U." and "Steelworkers", respectively) are the two unions who assert bargaining rights at these three sites. Pinkerton's of Canada Limited and Burns International Security Services Limited (hereinafter "Pinkerton's" and "Burns" respectively) intervened in this proceeding (as the predecessor employers) but only Burns chose to participate in argument.

II. Intervention

2. At the outset of the hearing, Mr. Nixon and Mr. Fishbein requested standing to participate in argument on behalf of two other entities - Mr. Nixon on behalf of the Association of Professional Security Agencies (hereinafter "APSA"), and Mr. Fishbein on behalf of the Canadian Union of Professional Security Guards (hereinafter "CUPS"). Both Mr. Nixon and Mr. Fishbein advised the Board that their legal arguments would not be affected by the intervention of these parties, inasmuch as they would be making identical submissions on behalf of Burns and the

C.S.U. respectively. The Board reserved its decision on this request and counsel proceeded to argument based on an agreed statement of facts, which is set out below.

3. Rule 26 of the Board's Rules of Procedure provides that the Board may add any person as a party as it considers advisable. Accordingly, a great deal of latitude is provided to the Board to determine whether intervenor status should be provided to any particular entity. In essence, counsel for the proposed intervenors focused on the significance of this decision for the security guard industry when submitting that status should be provided to these entities. In our view, it is not appropriate in this case to grant status to these two entities. As has already been noted above, this proceeding was argued on an agreed statement of facts, and as both Mr. Nixon and Mr. Fishbein advised that their submissions would not be affected by the intervention of APSA or CUPS, there appears to be little (if any) value gained by granting APSA or CUPS intervenor status. Accordingly, we decline to do so.

III. Agreed Facts

4. As noted above, the parties argued this case on the following Statement of Agreed Facts. References to exhibits attached to the statement have been deleted.

STATEMENT OF AGREED FACTS

BARGAINING RIGHTS

1. The Responding Party, United Steelworkers of America ("USWA"), was certified as bargaining agent for certain employees of Pinkerton's of Canada Limited ("Pinkerton's") in the Regional Municipality of Ottawa-Carleton on April 28, 1993.
2. The USWA was certified as bargaining agent for certain employees of Burns International Security Services Limited ("Burns") in the Regional Municipality of Ottawa-Carleton on March 24, 1993.
3. The Responding Party, Canadian Security Union ("CSU") was certified as bargaining agent for all employees of the Applicant, Ensign Security Services Ltd. ("Ensign") in the Regional Municipality of Ottawa-Carleton, save and except site supervisors and persons above the rank of site supervisor, by Decision and Certificate of the Board dated March 25, 1993. The Certificate issued following a representation vote among the employees in the bargaining unit in which the majority of the ballots cast were in favour of the CSU. Contrary to paragraph 4 of Schedule A of the Response of the USWA, the USWA does have knowledge of the bargaining rights of the CSU. The USWA purported to intervene in the CSU's application for certification for employees of Ensign, challenging the trade union status of the CSU, and also purported to file its own application for certification (O.L.R.B. File No. 3258-92-R). The Board dismissed the USWA's intervention and ultimately, after deferring it until determination of the CSU certification application, also dismissed the USWA's application for certification.
4. Pursuant to that Certificate, the CSU and Ensign entered into negotiations culminating in a collective agreement effective from July 30, 1993 until July 29, 1996. Subsequent to the negotiation of that agreement, the relevant business operations of Ensign Security Services Limited were acquired by Ensign Security Services Inc., which is therefore the current name of the employer.

ACQUISITION OF SECURITY CONTRACTS

5. Prior to January 1, 1994, Burns held the contract for the provision of security services at 350 - 360 Albert Street in Ottawa ("Constitution Square"). Effective January 1, 1994, Ensign became the security contractor at that site.

6. Prior to January 15, 1994, Pinkerton's held the contract for the provision of security services at Heritage Place in Ottawa. Effective January 15, 1994, Ensign became the security contractor at that site.
7. Prior to January 22, 1994, Pinkerton's held the contract for the provision of security services at 45 - 99 Rideau Street in Ottawa. Effective January 22, 1994, Ensign became the security contractor at that site.
8. The changes of security contractors referred to paragraphs (5) to (7), above, each constitute a sale or transfer of a business within the meaning of Sections 64 and 64.2 of the *Labour Relations Act*.

CONFLICTING UNION CLAIMS

9. In several telephone calls and letters to Ensign, the USWA claimed bargaining rights for all employees that Ensign now employs at each of the three locations referred to above ("the Sites").
10. The CSU has also claimed bargaining rights for the Sites following the aforesaid sales or transfers.
11. On February 2, 1994, Ensign received a Request for Appointment of Conciliation Officer filed by the USWA in respect of the employees employed at Constitution Square.
12. Ensign has objected to the appointment of a conciliation officer, pending the outcome of these proceedings. The Minister has determined that the request by the USWA for the appointment of a conciliation officer raises questions as to his authority to make the requested appointment. Accordingly, the Minister has referred this matter to the Ontario Labour Relations Board for advice on his authority to make the requested appointment. [The parties indicated that this Ministerial reference, Board file 4441-93-M, has been adjourned *sine die* pending the determination of this Board file].

ENSIGN ORGANIZATIONAL STRUCTURE

13. Ensign's operations in the Ottawa area are under the direction of its Vice President, Eastern Regions, Mr. William J. Murrell. Mr. Jack Robinson, Chief of Security, reports to Mr. Murrell and is responsible for managing all of the guards and Site Supervisors employed by Ensign in the Ottawa area.
14. Ensign employs sixty (60) guards and five (5) Site Supervisors in the Ottawa area. All of them are employed within the geographic scope of the CSU's bargaining unit. This includes four (4) guards at Heritage Place, two (2) guards at 45 - 99 Rideau Street and five (5) guards (plus one (1) Site Supervisor) at Constitution Square.
15. After obtaining the contracts for each of the Sites, Ensign instituted its own operating and reporting systems. For example, Ensign instituted usage of its own Daily Shift Reports, Incident Reports, Supervisor's Shift Reports and Monthly Current Summaries. Employees communicate with supervision through Ensign's centralized, province-wide Dispatch Office. Ensign employees at the Sites all now wear Ensign uniforms.
16. Personnel functions for the Ottawa area, including the new Sites, are handled primarily by Mr. Robinson and Mr. Murrell. They handle recruitment and hiring, discipline and discharge. Mr. Robinson approves schedules prepared for his review by the site supervisors. Mr. Robinson also submits the hours worked by each guard to Ensign's Mississauga office, which then processes this information for payroll purposes. Mr. Robinson also prepares all seniority lists, job postings and transfer documents. He is assisted from time to time by Francine Murrell, who works as a clerical/administrative employee on a part-time/casual basis. Most of the clerical and payroll functions are performed at Ensign's Mississauga office.

17. Ensign's practice in the Ottawa area is to post vacancies in order to allow employees at one building to bid on jobs available in another building. Jobs in different buildings often have different rates of pay and different hours of work. Movement between buildings is therefore common.
18. From time to time, a customer will instruct Ensign that it will not allow a particular guard to continue working in its building. This is called a "DO NOT RETURN" or "DNR" order. This occurred recently with a guard by the name of Jamie Martin, in respect of whom a DNR was issued by the customer at the World Exchange Tower. If the guards' conduct which caused the DNR does not constitute just cause for dismissal, in the opinion of Ensign's management, Ensign's practice is to transfer such an employee to another building. Accordingly, Jamie Martin was transferred from the World Exchange Tower to the Royal Bank Centre.

STAFFING AT THE THREE SITES IN QUESTION

19. Pursuant to the *Employment Standards Act*, Ensign made offers of employment to all employees of Pinkerton's and Burns, respectively, employed at the Sites.
20. At 45 - 90 Rideau Street, the single incumbent security guard, Terry Klován, who had been employed by Pinkerton's for approximately twenty-one years, declined Ensign's offer of employment and continued working elsewhere for Pinkerton's. Ensign replaced him with two part-time security guards, John Eisnor and Akka Smies, both of whom had previously been employed by Ensign at other sites in the Ottawa area at which the employees are covered by CSU's collective agreement. John Eisnor commenced employment with Ensign on January 13, 1994 and worked at the Metropolitan Life Building, the Royal Bank Centre and the Orleans Town Centre prior to being transferred to 45 - 99 Rideau Street. Akka Smies commenced employment with Ensign on December 31, 1993 and worked at the Metropolitan Life Building, the Orleans Town Centre and Constitution Square before being transferred to 45 - 99 Rideau Street.
21. At Heritage Place, two of the four incumbent security guards accepted Ensign's offer of employment and have been employed since January 15, 1994. One of the guards who did not accept Ensign's offer was replaced by Alderin Guiste who, before commencing work at Heritage Place, had worked for Ensign at the World Exchange Plaza in Ottawa, a site at which the employees are covered by CSU's collective agreement. The second employee who declined Ensign's offer was replaced by Kevin Stewart, who was hired for that purpose. Later, a third incumbent employee, Stephen Ryan, quit effective February 11, 1994. He was replaced by Garth Bourgaize who moved from part-time to full-time on February 18, 1994. Alderin Guiste quit on January 26, 1994 and was replaced by Phillipe Gagnon. Gagnon had also worked at the World Exchange Plaza and Metropolitan Life buildings (which are covered by the CSU agreement) and Constitution Square. Garth Bourgaize, has also worked at the Metropolitan Life and Royal Bank buildings (which are covered by the CSU agreement) as well as at Heritage Place.
22. At Constitution Square, all five of the incumbent security guards accepted Ensign's offer of employment and have been employed there since January 1, 1994.
23. The previous supervisor of security at Constitution Square, Paul Kovak, who worked for the property management company, retired just before Ensign commenced its contract there. He was replaced, on the day shift, by Wayne Bigelow, a Site Supervisor. Before being transferred to Constitution Square, Bigelow had previously worked for Ensign at the Royal Bank Centre in Ottawa as a Site Supervisor, supervising employees in CSU's bargaining unit.
24. In addition to Bigelow's supervision, Ensign now has a CSU bargaining unit employee, Patrol Officer Avril Cunningham (who works the majority of his time at the Orleans Town Centre, a site covered by the CSU's collective agreement), performing shutdown patrols and post inspections at Constitution Square six nights per

week. At Tower I, he does a post inspection and at Tower II, he does a shutdown patrol. He also does post inspections at Heritage Place three times per week. During these inspections, he inspects the work of the security guards at those locations and completes a document entitled "Supervisor Shift Report" in respect of such inspections.

25. Patrol Officer Avril Cunningham also does post inspections three (3) nights per week at Heritage Place, and six (6) nights per week at the Royal Bank Centre and the World Exchange Plaza.
26. On the seventh day of the week, Sunday, the Shift Supervisor who is on duty at the World Exchange Plaza building (who are represented by the CSU) does morning and evening patrol inspections at Constitution Square. Four (4) different individuals represented by CSU perform this function by rotation.
27. When there is a single security guard on duty at Constitution Square, the Applicant implements its "buddy system" whereby the security guard is in contact by two-way radio with the security guard on duty at another location, the Royal Bank Centre. Under this "buddy system", the security guards are required to check with one another by radio at least once every thirty (30) minutes, or in the case of emergencies. The guards at the Royal Bank Centre are represented by CSU.
28. Ensign has within its work force a group of approximately twelve part-time security guards who fill in for absent guards, those on vacation or in the event of temporary vacancies, at each and every site in the Ottawa area for which it has security contracts. These part-time guards are included in the CSU bargaining unit. Up to this time, four of them have worked one or more shifts at Constitution Square, since January 1, 1994 and it is expected that this will continue as needed. Up to this time, four of them have worked one or more shifts at Heritage Place and it is expected that this will continue, also as needed.

BURNS' ORGANIZATIONAL STRUCTURE

29. The Ottawa office of Burns is one of 7 regional offices across Canada. The Canadian head office of Burns is in Toronto where the General Manager of Canadian operations is located. Burns' operations in the Ottawa area are under the direction of a Regional Operations Manager. In the Ottawa office five people report directly to the Regional Operations Manager. One of these five people is a Client Service Manager. In Ottawa four Field Supervisors and four Site Supervisors report directly to the Client Service Manager. The Field Supervisors and Site Supervisors supervise all of the security guards in Ottawa.
30. Burns employs approximately 150 security guards in Ottawa. These security guards work at approximately 24 sites in Ottawa.

Burns' Ottawa Office Structure

31. The office staff in the Ottawa office consists of:
 - one Client Service Manager;
 - one Hiring and Training Supervisor;
 - one Business Development Representative;
 - one Administration Clerk/Timekeeper;
 - one full time and one part time Communications Officer; and
 - the four Ottawa Field Supervisors who report into this main office.

Duties of Ottawa Office Personnel

32. The Client Service Manager supervises, motivates and trains the security guards to ensure quality of service during regular business hours. They deal directly with the clients. The Field Supervisors who work evenings and nights also supervise and motivate

the security guards as well as attend at the job sites in order to verify that the security guard on duty is performing his duty and is following the operational orders. They check in at the Ottawa office but spend most of their time visiting the various sites under their supervision and responding to emergencies. In case of any emergency a Field Supervisor or Client Service Manager is contacted. Field Supervisors have limited client contact and have less authority than Client Service Managers.

33. The Hiring and Training Supervisor is in charge of the hiring and training of new security guards as well as providing uniforms to all security guards. He/she orders the uniforms and ensures that every guard has the appropriate uniform. Security guards at Burns are provided with their shirts at cost and are loaned the balance of their uniform. The Hiring and Training Supervisor also screens all application forms, interviews potential employees and provides the necessary training.
34. The Administration Clerk/Timekeeper inputs the payroll and invoicing as well as administers the benefits for all the employees. All data entry with respect to invoicing is done in the Ottawa office. All invoices are mailed from the Ottawa office to clients. All accounts receivable are received in the Ottawa office and deposited in Ottawa.
35. The Communications Officers look after the movement of the security guards. They are in charge of the POCO system which is an automated guard reporting system. If a guard does not report in at his allocated time the system automatically contacts the guard. If the guard does not answer, the system then notifies the Communications Officer who would then notify the Field Supervisor or Client Service Manager. The Communications Officer is also responsible for scheduling and for maintaining time sheets for guards. It is the Communication Officer who schedules replacement workers in the case of absences or illnesses.

Ottawa Office Activities

36. In order to apply for a job with Burns an individual must apply at the Burns Ottawa office. An interview is held at the Ottawa office. The potential candidate then attends an orientation program at the Burns Ottawa office or occasionally at an outlying site location. If it is decided to hire the individual, Burns would apply for a security guard license through the Ontario Provincial Police and the new security guard would likely be placed at a site temporarily or on an availability list until an appropriate posting is found.
37. The central dispatch office is located in the same administrative office in Ottawa. It is from this office that the Communications Officers maintain contact with the guards in the field and administer the POCO system. It is also through this office that guards are scheduled, replacements scheduled where needed and time charts are maintained.
38. Any discipline with respect to a guard will take place at the Ottawa office. The Regional Operations Manager and the Client Service Manager together meet with a guard if there is a serious infraction. For some infractions, such as lateness, the guard will only be issued an infraction report which will be put on his file. However, if it is a more serious infraction or there are a number of infractions the guard will be called into the office for a meeting with the Regional Operations Manager and the Client Service Manager. In case of a serious infraction on site such as the intoxication of a guard, the Field Supervisor has the authority to replace the guard at the time of the incident. The next day the guard would then be summoned to the office to meet with the Regional Operations Manager and the Client Service Manager. The Regional Operations Manager is the only person with authority to terminate the employment of a guard.
39. All personnel files are kept in the Ottawa office. The Administration Clerk/Timekeeper, the Client Service Manager, the Hiring and Training Supervisor and the Regional Operations Manager have access to these files. The files are locked after hours.

40. Burns security guards are paid wages based on the provincial minimum wage and the contract negotiated by Burns with each client.
41. Burns security guards are provided with the same benefits as outlined in the "Security Officer Benefit Plan"
42. Burns security guard seniority is based on the date of hire, is considered by Burns for the purposes of assigning employees to sites, lay offs, recalls and is recognized by an awards program.

Transferring of Employees

43. Attached as Exhibit 15 is a list of all the employees employed by Burns as security guards who report to the Ottawa office during the calendar year 1993. The list includes the following information from left to right on the chart:
 - Site Number
 - Employee Name and Site Name (Blacked out for client confidentiality reasons)
 - Category number which categorizes the employee at that particular site
 - Week number (1 to 52)
 - Unbillable (03 is unbillable time for training)
 - Rate of pay
 - Day one of that particular week
 - Straight hours
 - Overtime hours
 - Number of sites that particular employee worked at in 1993

Training of Employees

44. Employees working at Constitution Square were trained at the Burns office in Ottawa under the Burns Hiring and Training Supervisor. When they were first employed by Burns, each of these employees completed 6-8 hours of security orientation training including access control, report writing, limits of authority, patrol rounds and procedures, public relations, and responding to emergencies. As well these employees were instructed in the use of fire extinguishers and WHMIS. Each of these employees then passed the security officer training final examination. Subsequently each of these employees received between 4 and 28.5 hours of training at Constitution Square. The first employee on the site was trained by the client and the Client Service Manager. All other employees were trained by guards with experience at the site. As well, all employees were required to follow post orders which were drafted by the client and Client Service Manager and kept at the site.
45. The collective agreement between

Pinkerton's and USWA is attached and marked as Exhibit 16.

5. It is apparent from the Statement of Agreed Facts that there currently exists competing claims to representation of the security guards who work at the three sites in question. The competing claims are the result of the broader-based bargaining rights held by the parties in the Regional Municipality of Ottawa-Carleton, in conjunction with the effect of section 64.2 of the Act which deems a sale of a business in certain circumstances. The Board must decide which union will ultimately represent the employees at the three sites in question. Ensign, Burns and the C.S.U. submitted that the workers at these three sites should ultimately be governed by Ensign's collective agreement with the C.S.U. The Steelworkers disputed this conclusion, submitting that the nature of section 64.2 of the Act necessitates the conclusion that Ensign's workers at these sites should be governed by its collective agreement with Pinkerton's and its bargaining rights with Burns. The Board heard detailed and helpful argument from counsel, and will outline and consider the positions of the parties directly below.

IV. Statutory Framework

6. The statutory provisions of the Act applicable to this application are the following:

64.(1) In this section,

“business” includes one or more parts of a business; (“enterprise”)

“predecessor employer” means an employer who sells his, her or its business; (“employeur précédent”)

“sells” includes leases, transfers and any other manner of disposition; (“vend”)

“successor employer” means an employer to whom the predecessor employer sells the business. (“employeur qui succède”)

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

(2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:

1. A proceeding before the Board under any Act.
2. A proceeding before another person or body under this Act, the *Hospital Labour Disputes Arbitration Act*, the *Crown Employees Collective Bargaining Act, 1993* or the *Agricultural Labour Relations Act, 1994*.
3. A proceeding before the Board or another person or body relating to the collective agreement.

(2.2) If the predecessor employer has given or been given a notice relating to bargaining for a collective agreement or has requested the appointment of a conciliation officer or mediator, the successor employer is considered to have given or been given the notice or to have made the request, until the Board declares otherwise.

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

(4) An interested person, trade union or council of trade unions may apply to the Board to determine,

- (a) a question concerning the scope of bargaining rights of the trade union referred to in subsection (3); or
- (b) a conflict in the bargaining rights of the trade union referred to in subsection (3) and another trade union representing employees of the successor employer.

(4.1) On an application under clause (4)(a), the Board may alter the composition of the bargaining unit for which the trade union referred to in subsection (3) holds bargaining rights.

(4.2) On an application under clause (4)(b), the Board may alter the description of a bargaining

unit in a certificate issued to any trade union or the definition of a bargaining unit in a collective agreement.

(5) An interested person, trade union or council of trade unions may apply to the Board within sixty days after the predecessor employer sells the business for the termination of the bargaining rights of the trade union referred to in subsection (3).

(5.1) On an application under subsection (5), the Board may terminate the bargaining rights of the trade union only if it considers that the successor employer has changed the character of the business so that it is substantially different from the business of the predecessor employer.

(6) This subsection applies if the successor employer carries on one or more other businesses and the successor employer intermingles the employees of the business sold to him, her or it with those of another business. On application, the Board may,

- (a) declare that the successor employer is no longer bound by the collective agreement to which the predecessor employer was bound;
- (b) determine the unit or units of employees that are appropriate for collective bargaining;
- (c) declare which trade union or council of trade unions, if any, becomes the bargaining agent for the employees in each of the bargaining units;
- (d) amend, to the extent the Board considers necessary, any certificate issued to a trade union or council of trade unions or any bargaining unit defined in any collective agreement; and
- (e) define or redefine the seniority rights under any collective agreement of the employees concerned.

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under clause (6)(c) and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and the notice has the same effect as a notice under section 14.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

(10) A declaration under subsection (6) has the same effect as a certification under section 9.1, for the purposes of sections 5 (application for certification), 58 (application for termination), 60 (termination of bargaining rights), 62 (application for certification or termination) and 125 (application for termination).

(11) Where one or more municipalities as defined in the Municipal Affairs Act is erected into another municipality, or two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled, and,

- (a) the Board may exercise the like powers as it may exercise under subsections (6) and (8) with respect to the sale of a business under this section;

- (b) the new or enlarged municipality has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of two of the person's business; and
- (c) any trade union or council of trade unions concerned has the rights and obligations as it would have in the case of the intermingling of employees in two or more businesses under this section.

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

64.2-(1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.

(2) This section does not apply with respect to the following services:

1. Construction.
2. Maintenance other than maintenance activities related to cleaning the premises.
3. The production of goods other than goods related to the provision of food services at the premises for consumption on the premises.

(3) For the purposes of section 64, the sale of a business is deemed to have occurred,

- (a) if employees perform services at premises that are their principal place of work;
- (b) if their employer ceases, in whole or in part, to provide the services at those premises; and
- (c) if substantially similar services are subsequently provided at the premises under the direction of another employer.

(4) For the purposes of section 64, the employer referred to in clause (3)(b) is considered to be the predecessor employer and the employer referred to in clause (3)(c) is considered to be the successor employer.

(5) This section shall be deemed to have come into force on the 4th day of June, 1992.

Also of pertinence is section 56.6 of the *Employment Standards Act* which reads as follows:

56.6-(1) If a successor employer replaces a previous employer who is providing services at the premises, the successor employer shall make reasonable offers of available positions to those persons,

- (a) who are in a continuing or a recurring and cyclical employment relationship with the previous employer immediately before the successor employer begins providing the services at the premises; and
- (b) whose principal place of work with the previous employer is the premises affected by the change in the employer providing the services.

(2) The successor employer shall make offers to the persons employed by the previous employer

in descending order of each person's seniority with the previous employer until all positions are filled.

(3) The successor employer is not required to offer positions to persons who are not qualified to perform the services required of them or would not become qualified to do so with a reasonable period of training.

(4) The successor employer shall use every reasonable effort to fill all positions at the premises with persons who were employed by the previous employer before the successor employer offers a position to any other person.

(5) The position offered must consist of performing, at the same premises, the same work that the person did for the previous employer, if such a position is available.

(6) If such a position is not available, the position offered must consist of alternative work that is comparable having regard to compensation, hours and schedule of work, perquisites, quality of working environment, degree of responsibility, job security and possibility of advancement.

V. Determination

7. As was observed by all counsel who appeared before the Board, the fundamental difference between the positions of Ensign, Burns, and the C.S.U., on the one hand, and that of the Steelworkers on the other, is the importance attributed by those parties to the nature of section 64.2 of the Act. Ensign, Burns, and the C.S.U. view section 64.2 of the Act as a provision which merely facilitates the application of section 64 of the Act (and the case law which has been developed by the Board interpreting that section); that is, these parties view s.64.2 of the Act as a "doorway" through which bargaining agents representing workers previously precluded from relying upon section 64 can now enter in order to take advantage of the protections provided by that section. The Steelworkers, in contrast, view section 64.2 of the Act as more than just a "doorway", and submit that section 64.2 of the Act and related revisions to the Act must be understood as a legislative scheme to provide site specific bargaining rights to employees in what was described by counsel as the "contract service sector". Counsel for the Steelworkers posited that any consideration of the substantive provisions of section 64 must be made in light of the provisions of section 64.2 of the Act. It appears to the Board that there is no better place to begin this decision than with a consideration of this most critical issue.

8. We have carefully considered all of the submissions of the parties, and all of the case authorities relied upon during argument (many of which will be discussed in detail below). In our view, section 64.2 of the Act does not have the effect which counsel for the Steelworkers urged upon us. We view the provision as one which permits unions and employers in certain circumstances to access the protections provided by section 64 of the Act. We set out our reasons for this conclusion immediately below.

9. Section 64.2 was added to the Act as part of the Bill 40 amendments which came into effect on January 1, 1993 (although section 64.2 of the Act is deemed by section 64.2(5) of the Act to have come into force on June 4, 1992). Section 64.2 of the Act is clearly a new point of departure for the Board. The Board's experience with section 64.2 of the Act, and with the interaction of that section with section 64, is still in its infancy. Accordingly, the blind application of prior Board jurisprudence or principles applicable to section 64 of the Act or its predecessors would be inappropriate. However, particular principles which have been established by the Board under its section 64 jurisprudence may, in any one case, be appropriate for application.

10. It is important at the outset to recall the historical perspective which prompted the passage of section 64.2 of the Act. The protections contained in section 64 of the Act have, tradition-

ally, been unavailable to trade unions which have organized employees of contractors in the “contract service” sector - i.e. building cleaning services and food services (see, for example, *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193 and *Federated Building Maintenance Company Limited.* [1985] OLRB Rep. Nov. 1585). As a result of the Board decisions referred to above, and others like them, bargaining rights enjoyed by employees of subcontractors were not continued in (typically non-unionized) successor subcontractors, notwithstanding that in most situations the employees of the former subcontractor would be hired by the successful tenderer. We concur with the observation of the Board in *Canadian Corps of Commissionaires (Toronto and Region)* [1994] OLRB Rep. April 353, at paragraph 9, where it was noted that the effect of section 64.2 of the Act “is to extend the reach of the sale of business provisions under section 64 to cases where there is a changeover in contracted services, whether or not there is a transaction or nexus between a predecessor and successor employer”.

11. It is in this historical context that we consider both the substance and effect of section 64.2 of the Act. Section 64.2(1) of the Act defines the circumstances in which section 64.2 will apply, and section 64.2(2) of the Act stipulates certain exclusions to the application of section 64.2 (it was agreed that these exclusions were not applicable to this proceeding). Section 64.2(3) of the Act identifies three prerequisites which must be established before a “sale of a business” is deemed to have occurred “for the purposes of section 64” of the Act. Section 64.2(4) of the Act defines, once again “for the purposes of section 64”, who is the “predecessor employer” and who is the “successor employer”. As a general observation, it is fair to say that section 64.2 of the Act standing on its own contains no protections for trade unions which have organized employees in the “contract service” sector and which face circumstances in which s.64.2 of the Act applies. To obtain the protections of the Act in these circumstances, the legislation deems the transaction to be a “sale of a business” and directs the attention of the parties to section 64 of the Act. It is under section 64 of Act that trade unions find the protections contained in the Act. It is, in our view, accurate to describe section 64.2 of the Act as a provision which grants access to section 64 of the Act: that is, that s.64.2 acts as a “doorway” through which trade unions can proceed to protect their bargaining rights in certain circumstances.

12. Counsel for the Steelworkers placed before the Board a number of propositions which he submits establishes his theory regarding the nature of section 64.2 of the Act. The propositions were described in argument as follows:

- (a) section 64.2(1) and (3) of the Act are predicated on site specific employment;
- (b) section 64.2 of the Act must be understood as part of a larger legislative scheme to provide site specific rights to “contract service” sector employees;
- (c) Board decisions to date indicate that the intention of section 64.2 is to protect rights of employees on a contract specific/site specific basis.
- (d) the conditions of s.64.2 of the Act must be satisfied before s.64 applies; and
- (e) the Board’s decision to depart from section 64(2) or (3) must be made in light of s.64.2 of the Act.

These propositions are considered immediately below.

13. With respect to counsel's first proposition, it is evident from a reading of section 64.2 of the Act that a pivotal concept critical to the applicability of the section is that of "premises". The concept of "premises" is referred to in both section 64.2(1) and section 64.2(3) of the Act. Counsel for the Steelworkers submitted in argument that the concept of "premises" in the security guard industry was synonymous with that of a "site" and therefore concluded that section 64.2(1) and (3) were predicated on site specific employment. We do not entirely agree. Although section 64.2 may, in certain cases, apply with respect to what in the "contract service" sector would be considered as a particular work "site", it is conceivable that there may be situations where more than one such "site" would constitute "premises" for the purposes of section 64.2.

14. In *Medieval Times Dinner & Tournament (Toronto) Inc.* (Board File 2367-93-R, July 11, 1994, as yet unreported) [now reported at [1994] OLRB Rep. July 865] the Board considered in detail the concept of "premises". In that decision, the Board determined that the term "premises" incorporated the entirety of the grounds of Exhibition Place rather than just the Arts, Crafts and Hobbies Building and an attached arena, which was the narrow focus of attention. As was observed by the Board in that decision, at para. 61, there is nothing contained in s.64.2(1) of the Act which precludes the conclusion that the concept of "premises" could be smaller or larger in geographical size than a particular "building". Likewise, there is nothing contained in that same subsection which precludes the conclusion that the concept of "premises" could be smaller or larger in geographical size than a particular "site" at which security guards work.

15. In further support of his proposition, counsel for the Steelworkers noted during argument that the parties had agreed that section 64.2 of the Act applied to the circumstances before us, and submitted that, as a result of s.64.2(3)(a), the parties had agreed that the security guards in question were performing work at premises which constitute "their principal place of work". In our view, this conclusion does not permit for the further conclusion that section 64.2 of the Act is predicated upon site-specific employment. We note in passing that in the circumstances of any particular case it may well be that one's "principal place of work" could consist of more than one specific physical location, although that issue is not raised for determination before us as there is a coincidence between the sites and the "premises" on the facts of this case.

16. In support of the second proposition referred to above, counsel referred us to Part XIII.2 of the *Employment Standards Act*, R.S.O. 1990, c.E.14, as amended ("the *ESA*"), and reviewed the terms of the successor employer provisions which were enacted to the *ESA* in tandem with those contained in section 64.2 of the Act. Counsel focused on the "site specific" nature of the language contained in sections 56.3 to 56.6 of the *ESA* in support of his proposition. The observations made by the Board directly above apply to this proposition as similar, almost identical concepts such as "premises" and "principal place of work" are contained in the *ESA*. The *ESA*, inasmuch as it requires successor employers to make "reasonable offers" of available positions to employees of the previous employer, does not mandate offers made on the same terms and conditions of employment enjoyed by those employees. Accordingly, the *ESA* does not appear to support the argument made by Steelworkers counsel, which implicitly would require identical terms and conditions of employment as were previously enjoyed at the "site" to be imposed on successor employers. The provisions of the *ESA* do not advance the argument made by counsel.

17. In support of his third proposition, counsel relied upon a number of Board decisions which have touched on, to a lesser or greater extent, the substance of section 64.2 of the Act. Counsel drew the Board's attention to the decisions of *Canadian Corps of Commissionaires (Toronto and Region)*, *supra*; *Accomdex Franchise Management Inc.* [1993] OLRB Rep. April

281; *Group 4 C.P.S. Limited* [1994] OLRB Rep. April 400; *Ogden Allied Building Services Inc.* [1993] OLRB Rep. Dec. 1346 and *Meadowvale Security Guard Services Inc.* (Board file 2404-93-R, February 14, 1994, unreported). It was submitted that each of these cases, to some extent, supported the proposition that the Board had recognized s.64.2 of the Act as intending to protect employee rights on a contract specific/site specific basis.

18. Having carefully reviewed these cases, we do not agree that they establish that the Board has protected the representational rights of workers and trade unions with particular emphasis on the specific site. In *Canadian Corps of Commissionaires (Toronto and Region)*, *supra*, the trade union (there, like here, the Steelworkers) had applied under section 91 of the Act, alleging a breach of section 81 of the Act. One of the issues before the Board was the applicability of section 64.2 of the Act in the circumstances, and the Board dealt with that issue at the outset. The Board ultimately found that section 64.2 of the Act applied to the circumstances of that case. In doing so, at paragraph 16, the Board made the following observation:

“There is no question that the language of section 64.2 reflects an intention that the premises will provide some kind of physical anchor for the application of the section”.

In *Accomodex Franchise Management Inc.*, *supra*, the Board, at paragraph 51, observed that:

“Under s.64.2 bargaining rights are maintained so long as there is a continuity of work done by unionized employees in that particular location”

Similarly, in *Group 4 C.P.S. Limited*, *supra*, the Board noted at paragraph 42 that:

“[Section 64.2] is unique because it attaches or anchors bargaining rights to work at particular premises”.

Counsel for the Steelworkers submitted that the effect of s.64.2, as described by these decisions, is to protect the rights of bargaining agents and employees on a site specific basis.

19. In our view, the authorities referred to above serve to emphasize that the concept of “premises” is of paramount importance to the applicability of s.64.2. None of the case authorities cited to us in argument support the proposition that the nature of the “location” where the work was being performed was critical to the determination made by the Board. It is true that the *Accomodex Franchise Management Inc.* and *Group 4 C.P.S. Limited* decisions make reference (in the former case) to a “particular location” and (in the latter case) to an “[attachment of] rights to work at particular premises”. This does not, however, have the widesweeping effect submitted by Steelworker counsel. The particular issue before this panel of the Board, that being the nature of s.64.2 of the Act, was not directly in issue in either *Accomodex* or *Group 4 C.P.S.*. In our view, as noted above, the critical concept for the purposes of the application of s.64.2 is that of “premises”. The “premises” may, again as noted above, be geographically smaller or larger than a “site” as commonly known in the security guard industry. The decisions, in our view, are equally consistent with the positions taken by Ensign, Burns, and the C.S.U.. Quite simply, there has been no authority placed before us which suggests that the provisions of section 64.2 of the Act, because of their particular nature, somehow override, preclude or otherwise qualify the ability of the Board to apply the provisions of section 64 of the Act.

20. We will deal briefly with the final two propositions submitted by counsel. First, we agree that s.64.2 of the Act deems there to be a sale of a business only when the 3 preconditions contained in subsections 64.2(3)(a) to (c) are satisfied. This is evident from a plain reading of s.64.2(3) and is not controversial. Finally, with respect to counsel’s final proposition, it would follow from our observations above that the specific nature of s.64.2 of the Act is not sufficiently sig-

nificant, in and of itself, to affect whether the Board will or will not, in any particular case, depart from the protections dictated by s.64(2) and (3) of the Act, although that is not to say that on the specific facts of any case the nature of the bargaining rights held by a trade union could never be of importance to the Board. The nature or structure of the bargaining rights governing the successor and/or the predecessor employer will be one factor weighed by the Board in determining the appropriate result under section 64 of the Act.

21. The position put forward by the Steelworkers was weakened by the terms of its own collective agreement with Pinkerton's, which provides, in Article 12.06, that the terms of the contract will apply to all sites acquired by Pinkerton's within the geographic scope of the agreement. Opposing counsel noted the contradictory position argued in this case and questioned rhetorically whether this was an attempt by the Steelworkers to comply with or contract out of the Act. Counsel for the C.S.U. submitted that all that the provision really did was reflect the desired industry practice, which was on all fours with the position adopted by Ensign, the C.S.U. and Burns, and which made labour relations sense. It does appear to the Board that the inclusion of the clause in the collective agreement may reflect what the parties thought made labour relations sense, at the very least.

22. In our view, section 64.2 of the Act is, in substance, a provision which facilitates the ability of bargaining agents to protect their representational rights in the event that the entity with which those rights are held loses the contract for services at a particular location. The Legislature has chosen to protect those rights by, in effect, creating an attachment or nexus between the bargaining rights and the physical location where the contracted services are performed. The Legislature has not, by enacting section 64.2, evidenced an intention to provide an unassailable superiority of site-specific bargaining rights when those rights conflict with broader-based rights such as in the case before us, nor has it determined that the Board's traditional responses to the sale of a business as reflected by Board jurisprudence under section 64 of the Act have in any way been ousted or qualified.

23. Accordingly, we will proceed to consider this case as one in which the provisions of section 64 of the Act apply.

24. There is no doubt that section 64 of the Act provides the Board with broad discretion to respond to an application under that section of the Act. Section 64(2) of the Act provides that, until the Board declares otherwise, the successor employer (here, Ensign) is bound by the collective agreement between the Steelworkers and Pinkertons, and section 64(3) of the Act provides that the Steelworkers continue to represent the former Burns employees. Section 64(4)(b) of the Act permits "an interested person" to apply to the Board (such as Ensign has done here) for a determination of the appropriate response to a conflict in bargaining rights. Should such a conflict of bargaining rights exist, section 64(4.2) of the Act provides the Board with the authority to "alter the description of a bargaining unit in a certificate issued to any trade union or the definition of a bargaining unit in a collective agreement". This authority is crafted in broad language and permits the Board to respond to innumerable circumstances in a manner which makes labour relations sense.

25. Furthermore, section 64(6) of the Act also provides the Board with broad powers in the event that the successor employer carries on one or more other businesses and intermingles the employees of the business sold to it with those of another business. Enumerated in subsections 64(6)(a) to (e) are the various powers provided to the Board to respond to the circumstances before it. Once again, the powers set out therein are broadly worded, permitting the Board to respond to the situation before it in a manner that makes labour relations sense. These powers

include the ability to declare that the successor employer is no longer bound by the collective agreement to which the predecessor was bound, to determine the unit or units of employees appropriate for collective bargaining, to declare which trade union becomes the bargaining agent for employees in each of the bargaining units and to amend, to the extent necessary, any certificate issued to a trade union.

26. Some argument was entertained respecting the proper basis for Board intervention in this application; that is, whether the appropriate authority for Board intervention is s.64(4.2) or s.64(6) of the Act. Counsel for C.S.U. asserted that these two subsections were independent and that either provision authorized the Board to remedy the conflicting bargaining rights. Counsel for Ensign (supported by counsel for Burns) asserted that, in situations where intermingling of employees and/or businesses is established, s.64(6) is the exclusive basis of authority for Board intervention. Having reviewed the provisions in question, we are of the view that this application can be determined pursuant to s. 64(6) of the Act, and it is unnecessary to consider the interaction between s.64(4.2) and s.64(6) of the Act.

27. In *Caressant Care Nursing Home of Canada Limited* [1984] OLRB Rep. Aug. 1060, the Board noted at paragraph 32 that:

... The focus of section 63 [now 64] is on the *business*, and it is the practical problem of running two *integrated* businesses, either each ostensibly under a different collective agreement, or one under a collective agreement and one "non-union", which would appear to have prompted the Legislature to provide the relief contemplated by subsection (6)...

Similarly, in *Loeb Inc.* [1985] OLRB Rep. May 697, the Board stated at paragraph 2 the following:

...Every existing collective agreement represents negotiated and entrenched rights and obligations on the part of all parties involved, and the Board's jurisdiction to restructure the scope clauses of existing collective agreements, or otherwise affect the entrenched and negotiated rights of the parties, is to be found under the narrower provisions of section 63(6) of the Act. That subsection requires that an intermingling of the two or more operations in question has taken place, and as the Board articulated in, for example, *Caressant Care Nursing Home of Canada Limited* ... the Board for this purpose looks at whether the *work* or job opportunities themselves have been intermingled in the new form of operation.

28. It is clear on the facts before us that an intermingling of both the employees and the "businesses" has occurred within the meaning of s.64(6) of the Act. The facts described in paragraphs 20, 21 and 23 to 28 inclusive of the Agreed Statement of Facts establish beyond any doubt that an extensive intermingling has occurred since the contracts for security services relating to the three sites in question were obtained by Ensign. Accordingly, the Board must determine what remedial response pursuant to s.64(6) of the Act is appropriate in the circumstances.

29. Counsel for the parties identified during argument a number of considerations which the Board ought to weigh in exercising its authority under section 64(6) (or, for that matter, s.64(4.2)) of the Act. As noted above, it is our view that the overriding consideration in determining an application under section 64(6) of the Act is that the Board craft a response which takes into account the labour relations realities and which, at the end of the day, makes good labour relations sense. The Legislature, realizing that conflicts in bargaining rights will, on occasion, occur as a result of sales of businesses, has left the resolution of those conflicts to the Board. In our opinion, little of practical value would be accomplished by an exercise of discretion which creates or leaves in place labour relations dilemmas for the parties. The overriding goal of the Board in fashioning a remedial response under section 64(6) of the Act is to minimize, if not completely eradicate, the conflict in bargaining rights in a manner which best protects the bargaining rights of the employees and which permits for a final resolution of the conflict then in existence.

30. On the facts before the Board, one option available to resolve the conflict of bargaining rights is to “carve out” of the municipal-wide bargaining rights currently held by the C.S.U. with Ensign the three sites which are in question, and permit the Steelworkers to continue to represent the employees at these sites. Not surprisingly, counsel for the Steelworkers strongly urged such a response by the Board. In addition to the argument counsel made regarding the primacy of sites in the contract service sector (which has been outlined and dealt with above), counsel observed that the employees at the former Burns and Pinkerton’s sites had voluntarily chosen the Steelworkers as their bargaining agent, and submitted that that choice should be tampered with only in rare and narrow circumstances. Furthermore, counsel relied upon the decision of the Board in *Bermay Corporation Limited* [1980] OLRB Rep. Feb. 166 as authority for the proposition that the Board is reluctant to interfere with existing bargaining relationships, and that vested rights are not to be easily disturbed. Counsel questioned whether the continuation of the Steelworkers’ bargaining rights at the particular sites would work “immediate and substantial harm” to Ensign.

31. Counsel for the Steelworkers found further support for this conclusion by noting that the Board had, in prior, unrelated applications for certification in the security guard industry, determined that a site-specific bargaining unit was appropriate (see, for example, *Burns International Security Services Limited* [1994] OLRB Rep. Apr. 347, a decision involving two of the parties to this application). This, he submitted, made the continued existence of these sites as “Steelworker” sites less troubling than might otherwise be suggested by the other parties. Counsel submitted that such a result would be well within the norm contemplated by the Act.

32. Counsel for Ensign, Burns and the C.S.U. resisted the option that the bargaining rights of the C.S.U. be altered by the Board, and submitted that the Board should, instead, alter the bargaining rights of the Steelworkers. Much of the argument of counsel for Burns focused on what was described as the “administrative nightmare” which would result should the Board adopt the approach urged by counsel for the Steelworkers. Counsel carefully reviewed the agreed facts and submitted that the evidence regarding Burns’ operations in the Ottawa area (which he submitted was representative of the industry) disclosed a highly centralized organization, with many if not most of the operational decisions being made at the Ottawa regional office. Counsel analogized the organizational structure of Burns to that of a wheel, describing the regional office as the “hub” of the wheel, and the sites staffed by Burns employees as its “spokes”. Counsel noted that the Steelworkers represented almost all employees at the 24 sites where Burns employees work in Ottawa. Counsel further noted that Burns security guards can and do transfer from site to site on a regular basis, and reviewed company records which demonstrated that many employees worked at more than one site in 1993. It was suggested that the motivation for such transfers was to take advantage of higher wage rates at certain sites, to obtain an improved working environment, to obtain better hours and/or shifts, and/or to work closer to home.

33. Counsel for Burns submitted that, in the long run, the consequences of finding in favour of the position adopted by the Steelworkers would be to create a balkanization or fragmentation of the Burns operations. Over time, it was suggested, Burns would, through the typical tendering process, gain some sites in the Regional Municipality of Ottawa-Carleton, lose some sites, and maintain other sites. If each of the sites gained through the tendering process were subject to bargaining rights held by a different trade union, there would be a large number of collective agreements to which Burns would become bound, with different terms and conditions of employment applicable to each site. Even if a large proportion of those “new” sites were subject to Steelworkers bargaining rights, there is no guarantee that the collective bargaining obligations at the sites would be identical. Counsel submitted that administration of the various agreements, with their different terms and conditions of employment, would be a nightmare for the industry employers. Multiplied throughout Ontario, the result would, suggested counsel, be “catastrophic”. In the Regional

Municipality of Ottawa- Carleton alone there would be numerous “islands” of bargaining rights, without connecting “bridges” linking the sites.

34. It was argued that such a result would be inappropriate both from the perspective of the successor employer and from the perspective of the employees working at the “new” sites. From the viewpoint of the successor employer, it would be unable to transfer guards throughout the various sites, as numerous problems would arise from such transfers. Even if a number of the new sites were represented by one bargaining agent, and assuming further that contracts were negotiated for all of those sites which permitted transfers between sites, counsel submitted that a number of Burns sites would nonetheless be ineligible for transfer and there would be no certainty that the sites that employees could be transferred to would be attractive to those employees.

35. Other rhetorical questions were raised by counsel, on the assumption that a mobility provision could be negotiated into site-specific collective agreements to permit movement of all employees to all sites. Counsel asked which union would represent the employees at any particular time. Would they need to join different unions to work at different sites? To which union (or unions) would dues be remitted? If benefits were different at different sites, under which agreement or agreements could benefits be claimed? How would seniority issues be resolved? How will the employer determine vacation entitlement if site contracts contain different obligations and/or rights? Overtime calculation and the appropriate hourly rate was raised as a potential problem, as would be the co-ordination of hours of work and shift schedules. Which union would represent a disciplined employee? What prior discipline would be relevant or admissible before an arbitrator? In addition, counsel observed that the employer would be burdened with negotiating innumerable, site-specific collective agreements, and would be potentially subject to constant labour disputes at these sites.

36. From the perspective of the employee, counsel for Burns submitted that the position taken by the Steelworkers undermined the ability of employees to move between sites, and to obtain the benefits of so doing. Counsel suggested that the right of the employees of the predecessor to move to the successor employer’s “new” site upon the predecessor’s loss of the security services contract (which is ensured as a result of section 56.6 of the ESA) would, as a practical matter, become worthless to the employee because he or she would, effectively, be “stranded” on an “island”. The result would be that no employee would ever want to accept an offer of employment made by the successor employer, defeating the intention of the provision.

37. Counsel for the C.S.U. noted, amongst other things, that the circumstances of this case did not disclose the possibility that the employees at the three sites in question would lose union representation should the application be successful; rather, the situation before the Board merely calls for the determination of which bargaining agent should represent the employees at these 3 sites. Counsel noted that those employees who choose to stay with the predecessor employer upon loss of the contract will be entitled to be governed by the predecessor’s collective agreement. Counsel also focused on the introduction of section 7 of the Act, submitting that the Legislature, at the same time as it introduced section 64.2 of the Act, expressed some support for the existence of broader-based bargaining units. Counsel for the C.S.U. concurred with counsel for Burns and Ensign, suggesting that the Board should reach a conclusion that makes sense from a labour relations perspective. Counsel submitted that the result of adopting the position outlined by the Steelworkers would be a labour relations “disaster”.

38. Counsel for Ensign reinforced many of the arguments outlined above. Particular attention was focused on what counsel referred to as the “practicalities” of the situation. It was suggested that to accede to the Steelworkers’ position would be to condone or encourage undue frag-

mentation in the industry. Counsel submitted that the only rational conclusion that could be reached by the Board would be to determine that the C.S.U. should represent the employees at the 3 sites in question.

39. In many regards, this case exhibits similarities to the decision of the Board in *The Municipality of Metropolitan Toronto*, [1992] OLRB Rep. March 315. That case involved an application by the Municipality to the Board for an order resolving a conflict of bargaining rights. The Municipality was bound to a municipal-wide collective agreement with CUPE, and the nursing home purchased by the Municipality was bound, amongst others, to a collective agreement with O.N.A.. The issue before the Board was the resolution of the patent conflict of bargaining rights and the Board resolved the matter by reference to the powers granted to it pursuant to what were then sections 63(4) and 63(6) of the Act.

40. The resolution of the conflict of bargaining rights in *The Municipality of Metropolitan Toronto* was one which required the Board to recognize the reality of the new business situation which had been presented to it. The Board acknowledged that “appropriate weight” must be given to the status quo, but observed that it was necessary to consider “the desirability of modifying the bargaining structure and representation rights” to reflect the new business reality. The Board noted, at paragraph 68, that the realignment of the bargaining structure in a “two union situation” does not raise concerns regarding access to collective bargaining that might well be significant in other contexts, and concluded as follows:

Accordingly, in two-union intermingling situations like the one here, the Board may be disposed to give less weight to the pre-existing status quo and employee preferences, and exhibit more concern about the problems of fragmentation and the establishment of coherent, sensible bargaining arrangements in the new business context.

41. The Board in *The Municipality of Metropolitan Toronto* also considered the issue of fragmentation to be of great significance. In that case, the Board observed, at paragraph 72, that the potential for fragmentation made ONA’s position untenable:

We simply do not consider it “appropriate” for collective bargaining purposes to sub-divide Metro’s organization in the manner urged upon by ONA. From an operational point of view, we do not think that Metro should be required to deal separately with a tiny minority of its employees (which is also a tiny minority of its nurses), with separate negotiating processes, separate interest arbitration, separate grievance procedures, separate representation on employer/employee committees, separate salary administration, separate seniority lists, separate pay equity plans, separate seniority promotion and transfer arrangements, etc. Any such barrier erected around the nurses at Carefree Lodge would be totally artificial, impractical, and would impede orderly collective bargaining. This is not a matter of mere administrative convenience, but rather an illustration of the kinds of labour relations problems which flow from fragmented bargaining structures, and to which the Board should be sensitive (see again: *Kitchener-Waterloo Hospital*, *supra*, at paragraphs 47-48). We do not consider these problems to be trivial, nor is it relevant that it is the employer that has raised them. It is precisely because these problems are real that the Board will not usually consider classification or departmental employee groupings to be appropriate for collective bargaining, and has been exceedingly reluctant to subdivide an integrated work force into a number of small bargaining units.

The concerns raised in *The Municipality of Metropolitan Toronto* are also raised on the facts before us.

42. As noted above, the Steelworkers relied upon the decision of *Meadowvale Security Guard Services Inc.* (Board file No. 2404-93-R, February 14, 1994, unreported) in support of its position. It would appear from a reading of the decision that Meadowvale successfully tendered for a security service contract encompassing 310-330 Front Street in Toronto. The employees of Mea-

dowvale working at the “site” were represented in their employment with the predecessor (Burns) by the United Plant Guard Workers. The parties agreed that s.64.2 of the Act applied to make Meadowvale a successor, but Meadowvale urged that a representation vote be held as a result of what it asserted was an intermingling which had resulted since it had assumed the contract. The Board ruled orally that, even if there were an intermingling on the facts, it was insufficient to warrant the ordering of a representation vote, particularly given the effect of section 64.2 of the Act.

43. The Board subsequently dismissed an application for reconsideration of the decision. In doing so the Board dealt briefly with the merits of Meadowvale’s position. In the course of its decision, the panel made the following observations:

8. The employer has similar contracts at other locations. Employees at a number of those other locations are represented by another union, others are not unionized. Some of those other bargaining rights are referable to “site specific” bargaining units; others represent bargaining units that include a combination of sites.
9. While we acknowledge that having different sites represented by different unions might result in greater administrative work for the employer, we noted that the intent of section 64.2 of the *Labour Relations Act* was clear, that is, to ensure that existing bargaining rights continue at specified premises where services continue to be provided albeit by a new employer.
10. The administrative problems created are not substantially different from problems created by the fact that some locations may be unionized and others not. The employer would no doubt prefer to have to deal with only one union. The clear intent of section 64.2 to provide that the applicant’s bargaining rights continue outweighed the somewhat greater administrative difficulties presented to the employer by virtue of the effect of that section.

44. The *Meadowvale Security Guard Services* decision is easily distinguishable from the case before this panel. *Meadowvale Security Guard Services* was not a case in which the Board dealt with a conflict of bargaining rights. It is apparent from the decision that Meadowvale, although unionized at other “locations”, some of those locations being “site specific” and others consisting of a combination of sites, was *not* governed by a collective agreement which could apply to the site in question prior to the assumption of the contract. In fact, it would appear that the employer in *Meadowvale Security Guard Services* did not raise the issue of altering the bargaining structures as a result of the deemed sale of a business pursuant to s.64.2 of the Act. In that case, Meadowvale was, in essence, asserting that notwithstanding the existence and applicability of s.64.2 of the Act, a vote ought to be ordered because it had sent certain of its employees to work at the acquired site. The Board’s response to that proposal was to observe that s.64.2 of the Act “(ensures) that existing bargaining rights continue at specified premises where services continue to be provided albeit by a new employer”. In the particular context of *Meadowvale Security Guard Services*, where there is no conflict of bargaining rights raised, we agree with the approach taken by that panel of the Board. Here, of course, the circumstances are significantly different and other considerations apply.

45. In situations where s.64(4.2) or 64(6) of the Act provide an opportunity for the Board to weigh “administrative difficulties”, the weight attributed to such difficulties will depend upon the circumstances of the case before the Board. As was noted by the Board in *Burns International Security Services Limited* [1994] OLRB Rep. April 347, at paragraph 17, the security guard industry is characterized by a wide range of bargaining unit descriptions:

It is not disputed that, in the security guard business, the Board has found quite a variety of bargaining unit descriptions to be appropriate. Those units have been as narrow as a single client site (the client’s address) and as broad as the Regional Municipality of Ottawa-Carleton. In

between, the Board has found to be appropriate municipal units of various sizes, and even combinations of municipalities. There is no evidence before us of any particular labour relations problems flowing from one or other of these configurations - although one might hypothesize that broader units are more stable, while narrower units more closely reflect particular employee terms and conditions of employment, which, as noted above, are linked to the client's service contract.

Accordingly, there are a potentially large number of situations in which the re-tendering of a security services contract may result in a conflict of bargaining rights, with or without intermingling.

46. The Board's response to an application under s.64 of the Act (whether it be pursuant to s.64(4.2) or 64(6) of the Act) depends upon all the circumstances of the case before it. The weight accorded to the type of "administrative difficulties" found in this case may well depend, in part, upon the nature of the bargaining unit descriptions in conflict. The security services industry is one which may often reflect a fragmented bargaining structure. In the case before us, the municipal-wide nature of the bargaining rights in conflict reflect a desire by the parties to maintain a stable relationship. One must keep in mind that, in an application for certification, the Board grapples with two conflicting goals - the desire to facilitate collective bargaining (which often encourages applications relating to smaller bargaining structures) and the desire to establish stable bargaining relationships (which often results in the adoption of broader-based bargaining structures). The approach to bargaining unit determination described in *Hospital for Sick Children* [1985] OLRB Rep. Feb. 266 reflects this inherent tension. But once collective bargaining is established, there are good labour relations reasons for deciding cases such as that before us in a manner which promotes stable bargaining relationships. The Legislature, by enacting what is now s.7 of the Act permitting for consolidation of bargaining units in certain circumstances, has recently reflected the desirability of establishing and maintaining stable bargaining relationships.

47. In our view, it would be inappropriate to adopt the position advocated by the Steelworkers in this case. Many of the concerns raised by counsel for Burns, Ensign and the C.S.U. are legitimately taken and are of significance to the Board. In *Canadian Labour Law* (2nd Edition, Canada Law Book) former Board Chair (now the Hon. Mr. Justice) G. W. Adams makes the following observations at p 8-27 regarding the approach taken by Canadian Labour Relations Boards in circumstances similar to those reflected by this case:

When intermingling involves the merger of two groups of unionized employees, a board will look to the existing bargaining structure to decide if maintaining these separate units can be justified. *The boards note that the choice of employees regarding their bargaining agent should be honoured, unless to do so would undermine rational collective bargaining.* Balanced against this recognition of the employees' wishes is the preference for single, all-employee units. *Where a conflict arises between these two policy goals, the interest of maintaining industrial peace prevails and undue fragmentation is avoided.* (footnotes omitted and emphasis added)

One questions how "rational" collective bargaining could proceed should the significant fragmentation occur that would be the result of the approach adopted by the Steelworkers. To accede to that approach would result, initially, in a few fragmented bargaining units which, if the circumstances then remained static, could, with some inconvenience, be accommodated by Ensign. However, over time, the bargaining relationships would increase in number to the point where impediments to orderly collective bargaining and to the administration of the collective agreements would become overwhelming. Ensign would ultimately be required to administer innumerable and different collective agreement obligations. Some, but not all, of the impediments are referred to above in paragraphs 34 and 35. In our view, there is little, if any, labour relations sense in creating a fragmented security guard industry in the circumstances before us, especially where the parties have established broader-based bargaining rights. From the perspective of a successor employer, the

prospect of having to administer numerous collective agreement obligations can hardly be said to be an attractive one.

48. Likewise, we are extremely concerned with the limitations that such a result would impose upon the employees working at sites acquired by a successor employer (and, of course, eventually, the employees who remain at sites retained by the successor employer). The employees of Ensign would, over time, find themselves isolated at one site for as long as they were employed with Ensign. Presumably, the Legislature intended that the rights created by section 56.6 of the *Employment Standards Act* would be exercised by employees who work on sites that are subject to a successful re-tendering of the security services contract. The practical effect of the Steelworkers' position would be to largely preclude employees from exercising such an option. And although it is true that the position adopted by Burns, Ensign, and the C.S.U. will require the employees at the sites to change bargaining agents (on the facts of this case), that result is tempered by the fact that the individuals will not be denied union representation. As is evident from the case authorities which were canvassed before us relating to the exercise of the Board's discretion under section 64 of the Act, and from the excerpt from *Canadian Labour Law* referred to above, the Board has, in similar circumstances, subordinated the principle that employees have the freedom to choose their union, to more significant, overriding labour relations concerns (see, for example, *The Municipality of Metropolitan Toronto*, [1992] OLRB Rep. March 315, at paragraph 68).

49. One remedial option available to the Board which would permit employees the ability to choose their bargaining agent would be the ordering of a representation vote. During the course of argument the parties addressed the issue of whether the Board ought to order a representation vote of Ensign employees in the circumstances of this case. At the risk of unduly abridging the thorough argument of counsel, the position of counsel for Ensign, Burns and the C.S.U. was that, as the relative number of former "Steelworker" employees was so small as compared to the number of "C.S.U." employees, the Board should not order a vote in the circumstances before us. Counsel for the Steelworkers submitted that such a vote would be appropriate should its initial submissions be rejected by the Board. Case authority was reviewed by all counsel.

50. Section 64(8) of the Act provides the Board with ample authority to order a representation vote in the circumstances. Again, however, we approach the determination of whether a vote ought to be ordered in this case from the perspective of whether to do so makes good labour relations sense. Here, two potential voting constituencies for a representation vote come to mind. The Board could order a vote of all employees of Ensign represented by the C.S.U. in the Regional Municipality of Ottawa-Carleton - in effect providing *all* Ensign employees in the bargaining unit with the opportunity to decide which of the two competing bargaining regimes would govern the relationship of the employees with Ensign. Although this potential constituency has the singular advantage of ensuring a "municipal wide" result, thus eradicating the fragmentation problem, a vote of this constituency makes very little practical sense for two obvious reasons. First, there is no apparent justification for allowing the "Steelworkers tail" to wag the "C.S.U. dog" - presumably the employees of Ensign who chose the C.S.U. as their bargaining agent did so with the knowledge that other bargaining agents - including the Steelworkers - existed. To provide all Ensign employees a vote would be comparable to providing them with an opportunity to terminate bargaining rights which is not specifically provided by the Act. Secondly, it is also possible, if this voting constituency were adopted, that *each* time a security services contract was acquired by Ensign its bargaining relationship would change, as between numerous different trade unions. This "revolving door" approach to labour relations exhibits no redeeming features from any participant's perspective. Accordingly, it must be rejected as an option available to the Board in this case.

51. A second, alternative voting constituency is also an option here - that is, the employees

at the site itself. Adopting this option would have the advantage of permitting those affected by the "deemed" sale to determine their own destiny regarding which bargaining agent will represent them. However, balanced against that advantage are other significant disadvantages. First, over time the fragmentation which counsel for Burns emphasized in argument would still occur although it may take longer to reach significant proportions; that is, even if employees at most of the individual "sites" acquired by Ensign voted in favour of the C.S.U. as their bargaining agent, those that did not would start the fragmentation process rolling and, over time, the problem of fragmentation would become severe for Ensign. Should employees vote for "their" incumbent on a regular basis the severe fragmentation referred to in argument would be expedited in time. The overall effect would be the same as if we were to rule in favour of the Steelworkers' primary position, which we have specifically rejected. To order a vote with a "site specific" voting constituency is to, in effect, guarantee the development of severe fragmentation over time. As has been noted above, the Board will in appropriate cases subordinate employee wishes where concerns over fragmentation are of significance. For the reasons outlined above, this is one of those cases.

52. We conclude that it is inappropriate in this case to order a representation vote of the employees of Ensign in either of the two potential voting constituencies. Accordingly, we are of the view that, in the circumstances of this case, the Board should make the declarations set out below pursuant to section 64(6) of the Act.

VI. Board Declaration

53. The Board, therefore, declares pursuant to s.64(6) of the Act that, effective the date of this decision:

- (a) Ensign Security Services Inc. is no longer bound by the collective agreement between Pinkerton's of Canada Limited and the United Steelworkers of America dated October 1, 1993 insofar as it applies to its employees employed at Heritage Place, Ottawa, Ontario, and 45-99 Rideau Street, Ottawa, Ontario;
- (b) the employees of Ensign Security Services Inc. formerly covered by the collective agreement referred to in paragraph (a), those employees of Ensign Security Services Inc. formerly covered by the certificate dated March 24, 1993 held by the United Steelworkers of America applicable to Burns International Security Services (Board file 3500-92-R), and those employees of Ensign Security Services Inc. covered by the collective agreement between Ensign Security Services Inc. and Canadian Security Union dated August 10, 1993 constitute one appropriate bargaining unit which is defined as follows:

"All security guards in the employ of Ensign Security Services Inc. in the Regional Municipality of Ottawa-Carleton, save and except supervisors and persons above the rank of shift supervisor."

- (c) the employees of Ensign Security Services Inc. formerly covered by the collective agreement referred to in paragraph (a), those employees of Ensign Security Services Inc. formerly covered by the certificate dated March 24, 1993 referred to in paragraph (b), and those covered by the collective agreement dated August 10, 1993 between Ensign Security Services Inc. and Canadian Security Union are

bound by the collective agreement between Ensign Security Services Inc. and Canadian Security Union dated August 10, 1993.

54. Should the parties encounter any difficulty in effecting the order of the Board, this panel of the Board shall remain seized of this matter.

DECISION OF BOARD MEMBER B. L. ARMSTRONG; October 25, 1994

I agree with the presentation of the evidence and argument in the majority decision. However, I disagree with the conclusion reached by the majority. In my view the bargaining rights applicable to the sites ought to bind Ensign.

3720-93-R FMG Timberjack Inc., Applicant v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, Responding Party

Bargaining Unit - Combination of Bargaining Units - Practice and Procedure - Remedies - Board earlier combining employer's "parts" and "manufacturing" bargaining units - Parties unable to resolve outstanding remedial issues surrounding application - Board directing parties to file further pleadings in order to facilitate hearing

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *W. A. Correll* and *H. Peacock*.

DECISION OF THE BOARD; October 3, 1994

1. This is an application pursuant to the provisions of section 7 of the *Labour Relations Act*, in which the applicant employer seeks the combination of the "parts" and "manufacturing" bargaining units of employees working at FMG Timberjack Inc. in Woodstock, Ontario. The employer also seeks an order from the Board directing that the seniority lists of the two units be "dove-tailed" upon consolidation. In its reply to the application, the responding party trade union resisted both the combination application and the dovetailing remedy sought by the applicant. It was the trade union's position that, were a combination direction to be made, the appropriate disposition of the seniority list issue would be the "end-tailing" of the parts unit.

2. A hearing was held on April 28, 1994, during which the Board directed that the two units be combined as requested by the employer. Although both parties at the hearing expressed their desire to have the matter of the seniority list adjudicated by the Board upon receipt of the combination order, the Board was of the view that it would be appropriate for the parties to attempt further efforts at a negotiated resolution of the matter. Accordingly, the parties were directed to meet again for that purpose.

3. Since the hearing of the matter, the Board has been advised by the parties that they have been unable to resolve the outstanding remedial issues surrounding this application notwithstanding their numerous further efforts to do so. Accordingly, the Board will schedule a hearing to hear the parties' representations concerning these matters, including the issue of whether the Board should exercise its remedial authority under section 7(5) of the Act. Such hearing will take place on October 21, 1994 at 9:30 a.m. at the Board's premises, 400 University Avenue, 6th Floor, in Toronto, Ontario.

4. Having reviewed the materials before it, the Board is of the view that it would be useful for the parties to provide further pleadings outlining their positions in order to facilitate the hearing of this matter. Accordingly, to the extent that this has not been effected by the parties' pleadings to date, they are directed to provide to the Board and to each other:

- (i) a list of all issues agreed upon in writing and a list of those issues that remain in dispute;
- (ii) an outline of its submissions as to whether the Board should adjudicate upon the issues that remain outstanding;
- (iii) its position with respect to each issue that remains outstanding, including an outline of the reasons that the party intends to advance to justify that position;
- (iv) all documents upon which the party intends to rely;
- (v) a statement of all material facts upon which the party intends to rely, including a description of the general nature of the business and the description of the work performed by members of the bargaining units affected by this application;
- (vi) a copy of the authorities, if any, upon which the party intends to rely;

5. The applicant's materials are to be filed with the responding party and the Board no later than October 14, 1994. The responding party's response is to be received by the Board and the applicant by October 19, 1994.

1533-94-U; 1729-94-U IWA-Canada, Local 1-2693 and Leo LaFleur, Applicants, v. Goulard Lumber (1971) Limited, Mark Goulard and Romeo Goulard, Responding Parties; IWA-Canada, Local 1-2693, Applicant v. Goulard Lumber (1971) Limited, Responding Party

Change in Working Conditions - Employee - Ratification and Strike Vote - Strike - Strike Replacement Workers - Unfair Labour Practice - Union's compliance with section 74(5) of Act arising in context of strike replacement application - Whether laid off employee with only possibility of recall entitled to participate in strike vote - Parties agreeing that individual entitled to vote only if found to be employee in bargaining unit - Board finding individual without sufficiently substantial employment attachment to be considered employee within bargaining unit with entitlement to vote - Board finding that employer carrying on business as before in hiring students who had worked for it for the last 4 summers and not recalling individual from lay-off who had worked for it for three weeks almost one year earlier - Applications alleging violation of statutory freeze and violation of strike replacement ban dismissed

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *W. A. Correll* and *H. Peacock*.

APPEARANCES: *James Fyshe* and *Claude Seguin* for the applicants; *K. R. Valin* and *Mark Goulard* for the responding parties.

DECISION OF THE BOARD; October 20, 1994

1. Board File No. 1533-94-U is an application under section 91 of the *Labour Relations Act* alleging that the responding parties violated sections 67 and 81 of the Act by failing to recall Leo LaFleur. During the course of the proceeding the applicant withdrew its allegation that the responding parties had violated section 67. Board File No. 1729-94-U is an application under section 91 alleging that the responding party violated section 73.1 of the Act by employing bargaining unit members and family members during a lawful strike.

2. On August 23, 1994 the Board made the following oral ruling:

The Board has carefully considered the evidence and arguments presented by the parties. On the evidence presented, we do not find that the responding party has violated section 81 of the Act. We understand that the Applicant has withdrawn its allegation that the responding party has violated section 67. The application in File No. 1533-94-U is therefore dismissed.

The Board also finds that Mr. Leo LaFleur was not entitled to cast a ballot in the strike vote held by the applicant on July 21, 1994. As a result, the union does not have the support of 60% of those voting and the provisions of section 73.1(4)-(7) do not apply. The application in File No. 1729-94-U alleging a violation of section 73.1 is therefore dismissed.

The following are the reasons for the above ruling.

Facts

3. The relevant facts in this matter are not in dispute. The responding party, Goulard Lumber (sometimes referred to in this decision as the “company”) is a mill owned and operated by the Goulard family in Sturgeon Falls. The applicant (sometimes referred to in this decision as the “union”) was certified to represent a bargaining unit of employees working in the company’s saw-mill, planing mill and mill yards on September 1, 1993. Students are excluded from the bargaining unit. The parties have not yet signed a first collective agreement. The union was on strike on August 22 and 23 when these matters were heard.

4. Leo LaFleur worked as a labourer at the mill from September 13 to September 24 and from September 27 to October 8, 1993. He has not been offered any work at the mill since that time. He has inquired on a number of occasions as to whether there was more work available. He has been advised that the company does not know when there will be more work available, but that he will be employed if more is available, providing all those who have worked longer for the company have already been offered it. Mr. LaFleur’s record of employment indicates that he was laid off and that his date of return is “unknown”. At the time he was laid off he did not receive his vacation pay. It is the company’s practice to pay vacation pay at the end of June. It will, however, pay vacation pay when an employee is laid off or released if the employee asks for it. It appeared from his testimony that Mr. LaFleur had assumed that he had received his vacation pay.

5. Two other people, Henri Charette and Michel Gagnon, worked for the company intermittently during 1993 for considerably longer periods of time than Mr. LaFleur. All three of them were laid off on the same day. None of them have been offered employment in 1994.

6. Leo LaFleur’s brother Ron, is on the union’s bargaining committee and was a union organizer. At a negotiation meeting on June 6 the company was asked when Leo LaFleur would be

“recalled”. It did not reply. There was no evidence that any inquiries were ever made with respect to Mr. Charette or Mr. Gagnon.

7. The company hired several students to work during the summer. One of the students, LeBlanc, had worked for the company for three or four summers. Students tend to do odd jobs around the operation and fill in at times for the regular employees. Marc Goulard testified that he tried to keep the students from “interfering” with regular employees. During the summer of 1994 Mr. LeBlanc performed the work of regular employees more often than he had in previous summers.

8. The union posted notices at the workplace advising employees that a strike vote would be held on July 21. On the morning of July 21 Leo LaFleur went to the mill and asked Marcel Marcoux, one of the members of the union’s bargaining committee, what his status was with respect to being a union member and being entitled to vote. Mr. Marcoux advised him that he did not know and that Mr. LaFleur should raise the question at the meeting that night.

9. The strike vote was held on the evening of July 21. The union’s business agent asked for two volunteers to scrutineer. The scrutineers provided the ballots and counted the vote. Members were provided with a separate table and ballot box to place their votes. Fourteen out of twenty-four, or 58% of the employees voted in favour of a strike.

10. After the vote was announced, most of the people attending the meeting left although the meeting had not been formally adjourned. The union’s representatives, Wilf McIntyre and Claude Seguin remained, as did Marcel Marcoux, Ron LaFleur, one of the scrutineers, two others and Leo LaFleur. Leo LaFleur then raised the issue of his status as a member of the bargaining unit and his entitlement to vote. After some discussion it was decided that he was entitled to vote if he had worked at the company after the union had been certified. LaFleur then marked a ballot which was sealed in an envelope pending evidence being submitted by him to the negotiating committee showing that he had worked after September 1, 1993. It was also decided that an application would be filed with the Board alleging that the company had violated the *Labour Relations Act* by failing to “recall” Mr. LaFleur.

11. The next day Leo LaFleur gave copies of his record of employment to Mr. Marcoux and Ron LaFleur. A few days later, the seven people who had remained at the meeting after the strike vote met and opened the envelope. Mr. LaFleur’s ballot was marked in favour of a strike. The union’s representatives considered this to mean that 60% of the bargaining unit members supported a strike.

12. On August 5 the union gave the company notice that it would be commencing a strike on August 8. It advised the company that it was prohibited from using replacement workers.

13. The union went on strike on August 8. Approximately 12 bargaining unit employees were crossing the picket line. Twelve Goulard family members (brothers, brother-in-law, sons and daughters) besides Marc have also been working. The mill has been operating at approximately 50% capacity.

Submissions of the Parties

14. The union withdrew its allegation that the company had violated section 67 of the Act at the conclusion of the evidence although it continued to allege that the company had violated the statutory freeze (section 81). The company denied that it had violated the freeze. It asserted that it was not a term or condition of Leo LaFleur’s employment that he would be re-hired to work

before any students were hired or that he would be re-hired before any students were given the work of bargaining unit employees. The company pointed out that the student, Mr. LeBlanc, had worked for three or four summers and therefore had considerably more “service” and experience than Mr. LaFleur. It submitted that it was continuing business as before by hiring students and it agreed that if there is extra work at some point in the future, it will offer it to Mr. LaFleur after the two other “temporary” employees, Mr. Gagnon and Mr. Charette, have been hired or offered the work.

15. The company also argued that the application was untimely and that it should have been filed when Mr. LaFleur was laid off in October 1993.

16. The company submitted further that it had not violated section 73.1 of the Act because Leo LaFleur is not an employee in the bargaining unit and was not entitled to vote. Therefore, it was not subject to the restrictions in sections 73.1(4)-(6). In the alternative, the company argued that the vote should be disallowed because the union had violated section 74(4) of the Act since Mr. LaFleur’s vote was not secret. It also claimed that LaFleur’s vote should not be counted because he was persuaded to vote in favour of the strike by the promise that an application would be filed on his behalf with the Board.

17. The company also argued that even if section 73.1 of the Act applies in this situation, there is nothing in the Act which prevents owners of a company and their sons and daughters from working during a strike and that such a restriction should not be read into the Act. It did not appear to be disputing that if the provisions of section 73.1 applied, it had violated the Act by continuing to employ the non-family bargaining unit members who had crossed the picket line. We were referred to the following decisions: *Re: 401548 Ontario Ltd. and Retail Wholesale & Department Union, Local 448* 28 O.R. 2nd 697; *Manoir Hotel Limited* (unreported decision of arbitrator Weatherill dated November 22, 1982); *President Motor Hotel* (unreported decision of arbitrator Davis dated December 21, 1982); *The Canadian Red Cross Society Ontario Division*, [1994] OLRB Rep. Jan. 34.

18. The union argued that it was a term and condition of Leo LaFleur’s employment that he had a right of recall and that he would be recalled prior to any students being hired or at least before any students were assigned bargaining unit work. It argued that that was business as usual and what would reasonably be expected by the employees. By failing to recall him before hiring Mr. LeBlanc the company had violated section 81 of the Act. We were referred to the following decision: *Oakville Lifecare Centre*, [1993] OLRB Rep. Oct. 980.

19. The union argued that Leo LaFleur was entitled to cast a ballot in the strike vote because he was an employee in the bargaining unit who had been laid off and had a right of recall. It was submitted that the Board’s jurisprudence with respect to who is entitled to vote in representation votes would not necessarily apply in this situation because the legislature did not intend to interfere in internal union affairs in conducting a strike vote but intended only to ensure that it is conducted fairly. The union suggested that the appropriate test which should be used to determine whether someone is an employee with a right to participate in a strike vote under section 74(5) is whether or not the person in question has a “sufficient and continuing interest in the dispute between the parties”. We were referred to a decision of this Board with respect to final offer votes: *Wilf McIntyre*, [1990] OLRB Rep. Oct. 1052 and two decisions of the B.C. Labour Relations Board; *West Langley Forest Products Ltd.* (unreported dated April 18, 1985) and *Citation Industries Ltd.*, 4 CLRB (2d) 123. The union argued that Mr. LaFleur had a sufficient and continuing interest in the dispute as he was an employee on lay-off with a right of recall or at least an interest in any recall rights which might be included in the collective agreement. We were referred to sec-

tion 74(6) of the Act which, it was submitted, illustrates the intention that the legislation be broadly applied.

20. The union argued that section 74(4) which requires that strike votes be taken by way of secret ballot must be read in conjunction with sections 74(5) and (6) which provide that all employees shall be entitled to participate in a strike vote. In these circumstances, a balancing is required and Mr. LaFleur's right to vote should take precedence over the requirement that his ballot be cast in secrecy. The union pointed out that Mr. LaFleur was not concerned that everyone knew how he had voted and that he had not been intimidated. It was submitted that the way in which the vote was otherwise conducted at the meeting met the requirement for secrecy. We were referred to the following decisions: *Toromont, a division of Toromont Industries Ltd.* (decision of the Board dated August 9, 1994, as yet unreported) [now reported at [1994] OLRB Rep. Aug. 1149]; *Mollenhauer Limited*, [1989] OLRB Rep. Oct. 1050; *City Plumbing*, [1987] OLRB Rep. June 810.

21. The union argued that the language of section 73(5) clearly restricts the use of family members in these circumstances as they were hired or engaged subsequent to the notice to bargain being given. The brother who was already employed at the company was prohibited from working by section 73.1(4). The union claimed that the company had violated section 73.1(7) as Mr. Goulard was encouraging employees to cross the picket line.

Decision

22. The relevant sections of the Act provide as follows:

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 54 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 45 applies with necessary modifications thereto.

* * *

73.1-(1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them; (“employeur”)

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; (“personne”)

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. (“lieu d’exploitation à l’égard duquel la grève ou le lock-out a lieu”)

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.
- 3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

* * *

74.-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties the report of a conciliation board or mediator; or
- (b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

(5) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

23. The provisions of section 81 are commonly referred to as the “statutory freeze”. In situations in which it may not be clear what the “rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, trade union or employees” are, the Board considers what the employer’s “business as before” was and what “the reasonable expectations of employees” would be in the circumstances. (See *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859 and *Simpsons Limited*, [1985] OLRB Rep. Apr. 594.) In situations such as this where there has never been a collective agreement delineating the terms and conditions of employment the Board considers the event alleged to be a breach of the section in light of any history of events between the employer and the employees which might be related. (See *Royalguard Vinyl Co.*, [1994] OLRB Rep. Jan. 59.)

24. The union claims that the company’s past practice establishes that it was a term of Leo LaFleur’s employment that he would be recalled to work before any students were hired or assigned the work of regular (bargaining unit) employees. However, the evidence simply does not support such a claim. The company’s past practice has been to hire summer students and for them to perform the work of regular employees from time to time. There is absolutely no evidence that it was the company’s practice to call in the people it uses occasionally for extra work, that is, Charette and Gagnon, before assigning the students to do the work normally performed by regular employees. Such a practice would not make sense. If the students are already at work, available, and on the payroll, why would the company hire or call in extra people to fill in? The evidence established that Charette and Gagnon were used by the employer occasionally when it had extra work and therefore needed more people and that they were laid off as soon as that work was finished. It is the company’s practice to call Charette before Gagnon because he worked at the company before Gagnon. Last September the company had so much extra work that it needed to call in a third person and it hired Leo LaFleur. It appears that if there is extra work in the future, the company is willing to hire Leo LaFleur again after first hiring Charette and Gagnon. However, the use of these extra workers has no relationship to the company’s use of students. There is no past practice of giving priority to these extra workers over the students. By hiring students but not hiring Leo LaFleur, the company was carrying on business as before and doing exactly what employees would reasonably expect. Employees would not expect the company to lay off a student who had worked for it for the last four summers in order to hire someone who had worked for it for three weeks almost a year ago in the absence of established contractual recall rights. For these reasons, we dismissed the application alleging a violation of section 81 of the Act. In view of our decision to dismiss this application it was unnecessary to decide whether it should be dismissed for delay.

25. A union must conduct a strike vote in accordance with sections 74(4)(5) and (6) and have the support of 60% of those voting in order to avail itself of the provisions of section 73.1(4)-(8). In this case both parties appeared to agree that Mr. LaFleur would only be entitled to vote if he was an employee in the bargaining unit. No evidence or argument was presented with respect to the union’s practice in other voting situations. There was no reference to the union’s constitution. The union claims that Leo LaFleur is an employee in the bargaining unit and therefore entitled to

participate in the strike vote because he has a right of recall. If Mr. LaFleur is found to be an employee in the bargaining unit, the union has the bargaining unit support that it requires. The company denies that he is an employee.

26. This appears to be the first time the Board has considered the question of who is an employee in the bargaining unit entitled to participate in a strike vote under section 74(5). However, there are many other provisions in the Act which refer to votes or require a quantification of the level of employee support for the union. Sections 8(2)(3) and 9 of the Act provide for certification votes and state that a vote may be taken if more than 40% or 55% respectively "of the employees in the bargaining unit" are or have applied to become members of the bargaining unit. Section 39 provides that the Minister may order that "employees in the affected bargaining unit" vote to accept or reject the employer's last offer. Section 40(1) provides that the employer may request the Minister to order a vote of "employees in the affected bargaining unit" on its last offer. Section 58(3) provides that a "representation" vote be held if more than 45% of the "employees in the bargaining unit at the time the application was made" have signified that they no longer wish to be represented by the trade union. Section 62(2) provides that the Board may hold representation votes before issuing a declaration in a trade union successorship application. Section 64(8) provides that the Board may hold representation votes before disposing of an employer successorship application. Section 93(19) provides that the Board may order a "representation vote" before it disposes of an application in a jurisdictional dispute.

27. The Act does not describe who an "employee" is for the purposes of these sections but the Board has had to make that determination on a number of occasions. In *Sidbrook Private Hospital*, [1991] OLRB Rep. March 397, the Board found that ballots cast by employees who had been discharged and had grieved in a termination application must be sealed until the grievance concluded whether or not they had been discharged for just cause. The Board reached its decision on the basis that "those employees who continued to have a legitimate interest and connection to the bargaining unit" should be entitled to vote even if they were not at work on the date the vote was held. The Board has not permitted an employee who was retiring but was using up her vacation entitlement and sick pay credits first to participate in a termination vote. (See *Strathroy Nursing Homes Limited*, [1987] OLRB Rep. Dec. 1606.) In *Wilf McIntyre, supra*, the Board did not permit an employee off work on workers compensation who was not expected to return to the workplace to participate in a final offer vote because it was "satisfied that McLean had no real connection with the workplace either at the time the strike began or on the day the vote was conducted and was therefore not an employee in the bargaining unit for the purposes of the vote held under section 40 herein."

28. While this Board has never specifically articulated a "test" which can be applied to every vote situation to determine whether an individual is an employee at the relevant time and therefore entitled to vote, its general approach has been uniform. The Board considers whether the interest of the person participating in the decision being made by way of the vote is significant enough to justify affecting the outcome of the vote for the employees whose entitlement to participate is not in question.

29. The Board found that in these circumstances, Leo LaFleur was not entitled to participate in the strike vote. His only interest in the potential collective agreement is dependent on what can only be described as the "possibility" that he might be employed by Goulard Lumber in the future. This tangential interest does not justify Mr. LaFleur being in a position to affect the decision being made by employees by way of a vote. Mr. LaFleur does not have a "real connection" to the workplace, nor does he have a "sufficiently substantial employment attachment", nor does he "continue to have a legitimate interest and connection to the bargaining unit". He has no interest

in the strike itself as he is not currently employed and has no rights of recall. For these reasons, the Board held that Leo LaFleur was not entitled to participate in the strike vote and dismissed the application under section 73.1.

30. As the Board ruled that the applicant did not have the support of 60% of those entitled to vote for the strike, the provisions of 73.1(4)-(7) did not apply and it was unnecessary to determine whether employing family members or encouraging people to cross the picket line were violations of section 73. It was also unnecessary to determine whether the method in which Leo LaFleur's ballot was cast was a violation of section 74(4).

3084-93-R IWA Canada Local 2693, Applicant v. Long Lake Forest Products Inc. and Kimberly Clark Forest Products Inc., Responding Party v. Ginoogaming First Nation, Intervenor #1 v. Long Lake Employees Association, Intervenor #2

Abandonment - Bargaining Rights - Sale of a Business - Union alleging that transfer of inactive sawmill amounting to sale of a business - Alleged successor employer arguing that union had abandoned its bargaining rights before the transfer and that it had purchased mere "assets", not a "business" - Collective agreement made in 1984 terminated and no replacement or renewal agreement entered into - Evidence of union's continuing interest and activity satisfying Board that union had not abandoned bargaining rights - Seven year hiatus between closure of mill and sale not detracting from conclusion that successor purchasing capacity to carry on the business formerly conducted by predecessor in relation to the mill - Board declaring that union continuing to be bargaining agent in respect of sawmill operations as if successor were predecessor

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

APPEARANCES: *W. Dubinsky* and *W. McIntyre* for the applicant; *F.J.W. Bickford* and *T. E. Inglis* for Long Lake Forest Products Inc.; *R. E. Mannisto* for Kimberly Clark Forest Products Inc.; *John Erickson* for Long Lake Employees Association; *A. Rasevych* and *John Erickson* for Ginoogaming First Nation.

DECISION OF BRAM HERLICH, VICE-CHAIR AND BOARD MEMBER D. A. PATTERSON:
October 18, 1994

I

1. This is an application under section 64 of the *Labour Relations Act* (the "Act"). The applicant (also referred to as the "union") alleges that there has been a sale of a business within the meaning of that section from Kimberly Clark Forest Products Inc. (hereinafter referred to as "Kimberly Clark") to Long Lake Forest Products Inc. (hereinafter referred to as "LLFP"). The union seeks a declaration that a sale within the meaning of the Act has taken place, that the union continues to hold bargaining rights in respect of the business sold, and that LLFP is bound by the terms of what the union asserts is a subsisting collective agreement originally entered into between it and Kimberly Clark.

2. This application was filed on December 3, 1993. On November 19, 1993 the Intervenor Long Lake Employees Association (hereinafter referred to as the "Association") had filed an

application for certification in respect of a bargaining unit of employees of LLFP (Board File No. 2952-93-R). The union claims that its bargaining rights, which had their genesis with Kimberly Clark continue and include those employees whom the Association is seeking to represent.

3. Both of these matters were listed for hearing in Toronto before a (somewhat differently constituted) panel of the Board on December 20, 1993. All of the parties listed in the style of cause except Ginoogaming First Nation attended before the Board at that time. In a decision dated December 21, 1993 the Board, on the agreement of the parties, directed that the application for certification be held in abeyance pending the determination of the instant matter. Also on agreement of the parties, hearing of the present application before this panel was scheduled and commenced on January 31, 1994 in Thunder Bay.

4. At that time Mr. R. Mannisto appeared on behalf of Kimberly Clark; he indicated that Kimberly Clark had no real interest in participating in this proceeding and took no position with respect to its disposition. He indicated, however, that should the Board or any of the parties require evidence from Kimberly Clark, the appropriate witness(es) could be provided. The remaining parties agreed that it was not necessary for Kimberly Clark to remain during the proceedings and Mr. Mannisto accordingly left on the understanding that the parties would contact him should any evidence be required from Kimberly Clark. Thus, although LLFP eventually called a former managerial employee of Kimberly Clark to testify (primarily, however, in relation to the abandonment issue raised by LLFP and not issues related to the sale per se), Kimberly Clark did not call any evidence and did not participate further in this proceeding.

5. Also in attendance at the first day of hearing in Thunder Bay was John Erickson who appeared as counsel for both the Association and the Ginoogaming First Nation, intervenors. Mr. Erickson stressed the importance to his clients of what he described as a joint venture between them and LLFP, an agreement he suggested would have to be revisited in the event the present application were to succeed. Notwithstanding that, Mr. Erickson indicated that other concerns had led his clients to decide to decline any further participation in this proceeding. Although Mr. Erickson consequently withdrew from the hearing, Mr. Adolphe Rasevych continued to attend at virtually all of the numerous subsequent hearing days and maintained a "watching brief" on behalf of Ginoogaming First Nation.

6. Before proceeding further, a number of observations concerning a number of the parties and their identities are in order. LLFP is the alleged successor employer in this matter. As the reader will be reminded shortly, LLFP is owned by Ken Buchanan through a holding company; it is one of a number of apparently associated companies operating within the forestry industry. It will not be necessary for us to inquire in any detail into any of the operations of companies other than LLFP. For ease of reference, however, (and we note that this is not an application under section 1(4) and neither did any of the parties raise any issues or seek any relief relative to that section of the Act) we, as the parties did, shall refer to these companies collectively as the "Buchanan group". We also note that although the applicant union in this matter is "IWA Canada, Local 2693", a collective agreement filed and having some importance in this matter lists the union party as "The Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America". To the extent this discrepancy was adverted to (not at all directly) it was implicit in the evidence of at least one union witness that IWA Canada, Local 2693 was a successor union to that referred to as listed in the collective agreement. No one suggested anything to the contrary and we have proceeded on that basis. Finally, we note that the same collective agreement identifies "Kimberly Clark of Canada Limited" as the company party to the agreement. The transaction which gives rise to the instant proceedings involved "Kimberly Clark Forest Products Inc." (and a numbered company). This discrepancy was adverted to by LLFP in the documents it

initially filed in these proceedings. However, as union counsel reminded us in final argument, counsel for Kimberly Clark, at the initial hearing day in Toronto on December 20, 1993 advised the Board that, for the purposes of this hearing there was no issue of substance arising from what was characterized as, in essence, a name change. LLFP did not subsequently raise the issue and, for example, when Mr. Mannisto indicated any required witnesses could be provided, did not indicate it wished to hear more about this issue. In final argument, however, a fleeting comment in respect of this discrepancy was made. We do not view it as having been seriously pursued and we have, for the purposes of this case treated “Kimberly Clark of Canada Limited” and “Kimberly Clark Forest Products Inc.” as one and the same person.

7. For reasons the Board is frankly unable to firmly grasp, hearing in this matter consumed 11 days of Board hearing time. Ultimately, and subject only to a few marginal exceptions none of which has any significant impact on the outcome of this case, there is virtually no dispute regarding the salient facts giving rise to this application.

8. Up until May of 1987 Kimberly Clark owned and operated a sawmill in Longlac in the north-western portion of the province. The union was the bargaining agent in respect of the mill operation and, in a separate bargaining unit, in respect of certain Kimberly Clark woodlands operations. In May of 1987 Kimberly Clark ceased operating the mill. Although there was no direct evidence establishing the causal link, we heard testimony that the closure of the mill was contemporaneous with an industry slump as well as the imposition of a 15% export tax on U.S. destined softwood lumber, the type processed at the mill. Until recently the mill remained dormant. Since 1987 various prospective buyers considered purchasing the mill. Indeed LLFP was incorporated in 1987 for the purpose of purchasing the mill. No sale of the mill was consummated, however, until LLFP and Kimberly Clark executed a document styled as an asset purchase agreement on June 23, 1993; the transaction was finalized in September of 1993 when title to the property and assets associated with the mill were conveyed to LLFP.

II

9. We shall deal first with the issue of abandonment raised by LLFP which asserts that, by the time of the transaction giving rise to this application, the union had abandoned any bargaining rights it may have previously held in respect of the Longlac sawmill operation.

10. Filed as an exhibit in these proceedings was a collective agreement between Kimberly Clark (of Canada Limited) and what was then Local 2693 of the Lumber and Sawmill Workers' Union (the predecessor to the applicant) which covered sawmill employees. The union asserts that this agreement continued to be in force at the time of the sale and is asking the Board to declare that LLFP, as a successor employer, is bound by its terms.

11. The agreement was executed on August 21, 1984; Article II, headed “PERIOD” provides, in part, as follows:

2.01 The Company and the Union agree one with the other that they will abide by the Articles of this Agreement from September 1, 1983 to August 31, 1986 inclusive and *from year to year thereafter unless either party desires to change or terminate the Agreement, in which case the party desiring the change or termination shall notify the other party in writing at least 60 days prior to September 1st of that particular year that such is its desire.*

[emphasis added]

12. By letter dated April 23, 1986 Fred Miron, on behalf of the union sent the following notice to Dave Linton, Kimberly Clark's then Vice-President Woodlands:

In accordance with, and as provided for in Article II, Period, Section 2.01 of the Agreement between the parties presently in effect, you are hereby informed that we desire to make certain changes to the aforementioned Agreement.

Our proposed changes to the Agreement will follow under separate cover.

13. Without detailing the evidence, it suffices to say that the period between April 1986, when the above notice was sent, and May, 1987, when the mill closed was fairly turbulent for Kimberly Clark, the union and the affected employees. Events effectively overtook Mr. Miron's notice and no substantive collective bargaining negotiations took place and no new or revised collective agreement was ever physically put together by the parties.

14. Subsequent to the closure of the mill, however, a number of mill employees selected on the basis of seniority were retained by Kimberly Clark for purposes related to the shutdown as well as ongoing security needs. With one notable exception the continuing tenure of those employees in the mill was relatively brief. Lanfranco Bresolin was, prior to the closure, employed as an operator in the mill and was the most senior active employee in the bargaining unit. Subsequent to the closure he assumed the duties of watchman, a classification contemplated in the sawmill agreement; his wage rate was reduced according to the agreement wage schedule. Mr. Bresolin continued in that position until his termination which was effective December 4, 1992, some six months prior to the execution of the sale agreement between Kimberly Clark and LLFP. During the entire period of approximately 5 - 1/2 years that Mr. Bresolin was employed as a watchman, union dues were deducted and remitted to the applicant on his behalf. In addition, periodic changes were effected to Mr. Bresolin's wage rate and other benefits. Although the evidence is unclear as to when it happened, sometime between the May 1987 closure and August of 1989, Fred Miron, then president of the union, met with M. A. Penttila, who had taken over the position of Vice-President of Kimberly Clark's Woodlands operations from Mr. Linton. The two reached an understanding, which was not reduced to writing, that Mr. Bresolin's wage rates (and possibly other benefits) would be determined by those in place for the corresponding classification at the Domtar White River mill where employees were represented by the same union. As a result Mr. Penttila instructed Mr. David Wright, who was Kimberly Clark's Superintendent of Human Resources for Woodlands and who was called to testify in these proceedings by LLFP, to monitor and pay the White River watchman rates to Mr. Bresolin. Accordingly, Bresolin's wage rates and other benefits were adjusted periodically, most recently in March of 1992.

15. In the summer of 1990 there was an exchange of correspondence between Mr. Miron and Mr. Penttila initiated by the latter who, on June 11, 1990 wrote as follows:

As you know, the Longlac Sawmill closed on May 15, 1987 and has not operated since. The last Collective Agreement in effect expired, by its terms, on August 31, 1986.

As a matter of record-keeping, this will notify you that the Company hereby terminates that Collective Agreement.

16. By letter dated June 21, 1990 Mr. Miron responded:

Your letter concerning the Longlac Sawmill Agreement has caught us completely by surprise, as we understand that the Sawmill, although closed, is still in exist[en]ce.

I wish to point out, this is the first notification from your Company on this matter. The Collective Agreement by its terms Article II - Period, 2.01, renews itself from year to year.

We do not accept that the Company can terminate the Collective Agreement and submit that the Collective Agreement is still in effect, and we intend to maintain our rights.

If you wish a meeting to discuss this matter, please notify me to arrange an amicable date.

17. Mr. Penttila replied on July 19, 1990:

... If as you suggest the Collective Agreement has renewed itself from year to year, notice of termination of the Agreement is timely under Article 2.01 and has been given. We disagree with your view that the Company cannot terminate the Collective Agreement since the Collective Agreement has either terminated itself in the past or, as a matter of record, our recent letter has terminated it pursuant to Article 2.01.

18. Miron and Penttila met subsequent to this exchange and as a result of what Miron understood to be Penttila's assurances regarding the union's continuing bargaining rights, Miron determined that it was unnecessary to take any further steps such as calling for negotiations or applying for conciliation.

19. In any event, this exchange of correspondence had no impact on the continuing treatment of Bresolin as detailed above. We should also advert briefly to other indications of the union's continuing bargaining rights in respect of the mill in the period from its closure to its sale to LLFP. The union, along with others, was involved in a committee set up to help relocate displaced sawmill employees; approximately one year after the closure Kimberly Clark granted a union request, pursuant to the agreement, to allow a number of displaced employees to retain their seniority for a further year; Bresolin continued to appear as a mill employee on successive Kimberly Clark seniority lists (the company continued, as it had prior to the closure, to generate a single seniority list including and identifying employees from both the woodlands and sawmill bargaining units) until his termination in December 1992.

20. LLFP urges us to conclude that, prior to the sale which is the subject of these proceedings, the union abandoned any bargaining rights it may have previously held in respect of the sawmill operations. In advancing this position LLFP relies principally on the Board decisions in *The Belleville and District Builders' Exchange*, [1963] OLRB Rep. May 114 and *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213. We have also considered the Board decisions in *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct. 919; *The Borden Company Limited, Ingersoll, Ontario*, [1976] OLRB Rep. July 379; and *Pinkerton's of Canada Limited*, [1986] OLRB Rep. June 818.

21. The union in response asserts that, at the time of the sale, not only had the union not abandoned its bargaining rights, but there was a subsisting collective agreement in place between it and Kimberly Clark. The union also points us to Board decisions in *Cooksville Steel Limited*, [1974] OLRB Rep. June 365 and *President Motor Hotel*, [1985] OLRB Rep. Sept. 1414, cases in which the Board found that the union had abandoned its bargaining rights which it is asserted are readily distinguishable from the facts at hand.

22. In the *O. & W. Electronics* case, cited above, the Board made the following general comments about the issue of abandonment (at paragraph 11):

If a trade union fails to act as a bargaining agent and sleeps on its bargaining rights for an extended period of time, it may be said to have abandoned its bargaining rights since it is expected that a trade union will actively promote the bargaining rights it has received. The question of abandonment is one of fact (or perhaps, more correctly, is a mixed question of fact and law) which must be established from all the evidence. As was stated at the hearing, if all the evidence relating to the intervener's bargaining rights was that a collective agreement was entered into in the latter part of 1962 which, on its face, purported to renew itself from time to time thereafter in perpetuity, and there was no other evidence of an active bargaining relationship existing between 1962 and the date of the making of this application [November, 1969], the Board would not hesitate in making a finding of abandonment on the part of the intervener....

Needless to say, however, the fact that the agreement had been entered into in 1962 would not necessarily cause the Board to reach the conclusion of abandonment if there were other extenuating circumstances. If, for example, the intervener had continued to hold union meetings with the employees in the bargaining unit, had regularly processed grievances through the extended period involved, had continued to receive union dues, and had maintained its membership among the employees in the bargaining unit, or had taken similar actions to assert its rights as the bargaining agent for the employees, the Board would not make a finding of abandonment because there would not, in fact, be an abandonment in such instance.

23. The *Belleville* decision, cited above, is part of a line of cases which have posited a “rule” relating to automatic renewal clauses. And while some may view the rule as “quaint”, we are prepared, for the purposes of the instant case, to assume that it has continued application. The “rule” is articulated as follows in the *Belleville* case:

In situations of this kind the Board has said that as a general rule it will have regard to a second automatic renewal but thereafter the onus is on the union to satisfy the Board that it has not abandoned its bargaining rights. This it may do by showing that it maintained an interest through contact with the other party to the agreement. Just what contact is necessary depends on the facts in each particular case. In this case there was none.

24. After considering the evidence, the parties’ submissions and the jurisprudence, we are frankly unable to determine which is less compelling - LLFP’s argument that the union has abandoned its bargaining rights or the union’s argument that there was a subsisting collective agreement at the time of the sale. We reject both.

25. The union argued that the agreement which was in place was the agreement executed in 1984, which it says continued to renew itself from year to year subject to the oral agreement regarding Bresolin’s terms and conditions of employment. We are satisfied that the 1984 agreement has been terminated. It is not necessary for us to determine precisely when it terminated, but we note that its automatic renewal is contemplated *unless* a party gives the type of notice Miron gave Kimberly Clark in 1986. But the real weakness in the union’s argument is seen in its attempt to characterize the continuing collective agreement as a kind of hybrid. The effect of an automatic renewal clause, when triggered, is to continue, *unchanged*, the terms of a collective agreement for a further period of time. Where a party wishes to see changes to the terms of a collective agreement, it must usually insure that any automatic clause is not triggered. Where changes are sought and automatic renewal is avoided, one would expect to see any resulting changes embodied in a new collective agreement (an agreement in writing) between the parties. What the union claims to have in this case is an automatically renewing collective agreement which incorporates changes which are not codified in writing and did not form part of the renewing agreement. This defies logic. We are satisfied that, at the time of the sale, there was no collective agreement in place between the union and Kimberly Clark in respect of the sawmill operation.

26. The fact that there was no collective agreement in place is not, however, determinative of the issue of abandonment. Bargaining rights do not simply dissipate with the expiry of a collective agreement. In the circumstances of this case, including an inactive mill, a single bargaining unit employee whose terms and conditions of employment the employer and union have agreed to tie to those in another unionized mill, it is hardly surprising that the union did not feel compelled to negotiate a collective agreement. Furthermore, it is abundantly clear to us that, based on the evidence of the union’s continuing interest and activity in relation to the sawmill bargaining unit, it simply cannot be said that the union has abandoned its bargaining rights.

III

27. Returning then to the facts and issues more directly related to “sale of a business”

issues, in January of 1993 Kimberly Clark issued a document titled "Longlac Sawmill Sale Bid Package" aimed at prospective buyers. The package called for a minimum bid of \$400,000 for the sawmill assets. It also contemplated that an area north of the mill, which the parties referred to as Nakina North, would be a prime area of lumber supply for the mill. The package proposed that, subject to the approval Ministry of Natural Resources ("MNR"), Kimberly Clark would relinquish the cutting rights it held for this area in favour of the purchaser. The document also contemplated certain ongoing mutual obligations as between Kimberly Clark and the purchaser in respect of Kimberly Clark supplying logs to the mill and the mill purchaser supplying resulting wood by-products to Kimberly Clark.

28. The asset purchase agreement entered into by LLFP and Kimberly Clark differed in some respects from the terms contemplated by Kimberly Clark's bid package. The purchase price was \$450,000 allocated in Section 2.02 of the agreement as follows:

- | | | | |
|-----|---|-----------------|------------|
| (a) | as to the Lands, | \$ 5,000; | |
| (b) | as to the assets referred to in Section 2.01(b) | | |
| | (i) Sawmill building | \$15,000 | |
| | (ii) Planer building | \$30,000 | |
| | (iii) Sorter building | <u>\$30,000</u> | |
| | Subtotal: | | \$ 75,000; |
| (c) | as to the equipment; | | |
| | (i) Dry Kilns | \$ 20,000 | |
| | (ii) Planer | 62,500 | |
| | (iii) Slasher | 7,500 | |
| | (iii) Sawmill | 50,000 | |
| | (iv) Sorter | 167,500 | |
| | (v) Rolling equipment | <u>62,499</u> | |
| | Subtotal: | | \$369,999; |
| (d) | as to the assets referred to in Section 2.01(d) and (e) [essentially plans, specifications, drawings and other records which may have been in Kimberly Clark's possession at the time of the sale], | \$1. | |

In addition Section 2.03 of the agreement provides:

The Purchaser and the Vendor, in filing their respective income tax returns, shall use the allocations of the Purchase Price as set forth in Section 2.02.

29. Unlike Kimberly Clark's initial bid package, the sale document did not contemplate any ongoing mutual obligations regarding wood supply to the mill or supply of by-products to Kimberly Clark. The parties to the sale did, however, deal with mill access to the wood supply in Nakina North (referred to as the "Supply Area" in the sale document) as follows:

ARTICLE FIVE - WOOD SUPPLY

5.01 The parties acknowledge that they have agreed in principle that the source of supply of sawlogs for the sawmill operation on the Lands shall be the north portion of the Vendor's licensed timber limits indicated on the map attached hereto as Schedule E (the "Supply Area"). The exact boundary locations will be determined by forestry representatives of each of the parties and will permit the yearly supply of 100,000 cords of softwood commencing upon the transfer of the rights in the Supply Area to the Purchaser contemplated by Section 5.02(c).

5.02 The parties further acknowledge that:

- (a) the Vendor's timber limits are licensed to it by the Province of Ontario pursuant to the Crown Timber Act;
- (b) the aforesaid timber licenses and rights granted thereunder are not assignable by the licensee without the prior written consent of the Minister of Natural Resources of Ontario (the "Minister"); and
- (c) the parties will jointly use their best efforts to expedite the required ministerial consent to sever the Supply Area from the Vendor's licensed timber limits and the transfer by the Minister of the rights in the Supply Area to the Purchaser.

5.03 The Purchaser covenants and agrees that it will not, directly or indirectly, petition the Minister or otherwise attempt to require the Vendor to supply sawlogs to the Purchaser from any portion of the Vendor's licensed timber limits other than the Supply Area.

5.04 The inability of the parties to arrange for a satisfactory supply of sawlogs as contemplated herein or any delay in such arrangements shall not affect the agreement of purchase and sale of the Assets provided for herein or the timing thereof.

IV

30. Thomas Inglis is the director of planning and development for various sawmills within what he described as the Buchanan organization. As such his responsibilities relate not only to LLFP but to five other sawmill operations which are all within the same organization (although some, if not all, appear to be distinct legal entities). LLFP, Mr. Inglis advised us, is owned by Ken Buchanan through a holding company. The Buchanan group and the applicant are not strangers to each other; the union holds bargaining rights in respect of 3 other Buchanan group mills.

31. Mr. Inglis testified at length in these proceedings - he spent 4 days giving his evidence. He provided the Board with information regarding LLFP's purchase of the mill and its plans for its future, the involvement of various native communities and their relation with Buchanan and LLFP, as well as the general background regarding the current policy and regulatory framework within which various aspects of the forestry industry are carried on.

32. Buchanan's interest in acquiring the Longlac mill dates back to its closure in 1987, the year LLFP was incorporated for the express purpose of acquiring the mill. Both the mill and LLFP remained dormant until the latter acquired the former in the sale which is the subject of these proceedings.

33. LLFP's stated aims with respect to the operation of the mill are quite straightforward. It intends first to acquire the requisite license to operate the mill. An application in this respect was filed with the Ministry of Natural Resources ("MNR") on October 18, 1993 and although the license is anticipated and nothing the MNR has said would suggest it will not issue, no such license had yet issued at the time of these hearings. Once the mill license issues, LLFP will turn its mind more immediately to the question of wood supply. In this regard it will pursue access to the wood supply in Nakina North and the scenario it and Kimberly Clark contemplated in the sale document. If these efforts succeed and the MNR accepts the arrangement, LLFP will emerge with a timber license and cutting rights in respect of the Nakina area. The precise status of these efforts is not entirely clear. In chief Mr. Inglis suggested that the Nakina area had been severed from Kimberly Clark's cutting rights; in cross-examination he said the severance is yet to happen. In either event LLFP has yet to secure cutting rights in the Nakina area and is focusing, at least for the interim, on acquiring the sawmill license. Of further concern, however, since the Nakina area con-

sists of entirely undeveloped forest, is the fact that significant development work (relating primarily to roads and access) must be done before any timber could be harvested. Mr. Inglis (whose evidence again varied somewhat on the point) estimated that it would take between 1 and 2-1/2 years after securing a timber license before any Nakina timber found its way to the mill. Thus, even on the most optimistic scenario from LLFP's perspective, there may be a significant period of time during which any wood supply required for the mill would have to be secured from other sources.

34. It is anticipated that the Nakina Area would be able to supply approximately 100,000 cords of wood to the mill annually. This would have been a sufficient supply for the mill as previously operated by Kimberly Clark. However, LLFP intends to run the mill as a 3 (as opposed to Kimberly Clark's 2) shift operation. As a result of the anticipated increased production Mr. Inglis estimated that 100,000 cords of wood would provide approximately 70% of the mill's requirements. LLFP, however, has even further ambitions aimed at increasing production at the mill. It intends, on a longer term basis and after the Nakina supply is secured, to add a second line to the mill once again increasing its timber requirements. In respect of these aspirations LLFP is looking to an area north of the Nakina area, the Ogoki Crown Management Unit ("Ogoki"). Discussions, which will be detailed a little more fully, are already underway regarding this area and its development. The participants have included LLFP, Matawa First Nations ("MFN", a native umbrella group representing some nine native bands including Ginoogaming First Nation) and MNR. By letter dated November 9, 1993, Mr. Inglis, on behalf of LLFP made a formal request of the MNR that a long term (20 year) Orde-In-Council Crown Timber License be granted to LLFP in respect of the Ogoki area. For reasons similar to those at play in Nakina, it would take a significant amount of time before any wood is harvested in Ogoki. In addition, issuance of a license for this area appears more complicated than in respect of Nakina which involves, effectively, the reassignment of an existing license in an area the MNR has already previously approved for forestry operations. Cutting rights in Ogoki, as a crown management unit, are currently simply unassigned.

35. Thus while LLFP's plans and goals are relatively clear, it will be some time before all of the various pieces fall into place even assuming everything unfolds as LLFP would like. Time, however, may be something LLFP can take advantage of, in view of both its short and longer term plans. In this regard Mr. Inglis testified that given the general state of the various assets at the time of purchase, it would not have been possible to immediately commence operating the mill. Thus, for example, by the time of the hearings in this matter considerable overhauls and repairs had been effected to the planer mill which is now fully operational.

36. Mr. Inglis testified about various costs including the cost of required repairs and installations in relation to the mill operations. We are required, however, to exercise some caution in accepting Mr. Inglis' evidence in this regard and with respect to various of his cost estimates. We do not mean to suggest that Mr. Inglis was not giving his evidence sincerely and with a desire to tell the truth. The estimates he provided, however, were provided in an extemporaneous manner and without any documentary support. And while we have little doubt that as a result of his considerable experience in the industry, Mr. Inglis is well positioned to make such cost estimates, the fact of the matter is that (not unlike some of his evidence already referred to regarding various time estimates) there were wide and divergent variations in his own figures at different points during his testimony. For example, his estimate of the total cost of getting the sawmill proper, the planer and the kiln operational varied from \$500,000 to \$2,000,000 at different points in his evidence; similarly the estimated cost of a new slasher went from \$300,000 in chief to \$200,000 in cross-examination. However, while we may be unable to confidently arrive at findings regarding the precise costs associated with various options available to LLFP in regard to overhaul, maintenance, repair or replacement of various equipment, the evidence is clear that the total cost of any such effort (even when the purchase price associated with the sale is folded in) is dramatically less than the cost of

constructing a new mill operation. This, of course begs the question, to which we shall return, of whether constructing a new mill could possibly have been a viable option for reasons other than simple cost.

V

37. For several years prior to becoming chief of Ginoogaming First Nation ("GFN"), Gabriel Echum was employed in various capacities by MFN, most recently as economic development regional consultant. It is unnecessary to outline the activities of this group in great detail. By early in 1993 the MFN's interest in the Ogoki area had crystallized to the point where it had formed a committee to look at various prospects for the area and had formally advised MNR of its interest in a "co-management" arrangement with the ministry as well as its interest in eventually acquiring the timber license for the Ogoki area. In pursuing those objectives and after receiving information that the Buchanan group was also interested in possible development of the Ogoki area, MFN wrote to Buchanan in April and, having received no reply, again in May of 1993 proposing a meeting to discuss matters of common interest. A meeting was finally held but not until July, several weeks after LLFP had executed its sale agreement with Kimberly Clark. At that meeting MFN indicated its interest in Ogoki and a possible joint MFN/Buchanan operation with respect to Ogoki. Mr. Inglis, attending on behalf of Buchanan, indicated the possibility of starting up the mill at Longlac and advised that Buchanan would be happy to work together with MFN since they needed the wood supply from Ogoki to support the two lines they intended to eventually have at the mill. Inglis told MFN that Buchanan had already unsuccessfully applied for the Ogoki area. He also testified that he had been told, at least informally, by MNR that a single applicant would be unlikely to acquire Ogoki rights and that a joint application (presumably made on behalf of different types of constituencies) would stand a better chance.

38. A second meeting between Buchanan and MFN took place in October. MFN and Buchanan again expressed their interest in an Ogoki license; Mr. Inglis suggested the possibility of some form of joint venture. As of the hearing no further meetings had taken place between Buchanan and MFN. Approximately two weeks after the October meeting, Mr. Inglis wrote to MNR formally requesting that a long term timber license in respect of Ogoki be issued to LLFP. While that application speaks of development, employment and training opportunities for MFN citizens, we cannot help but observe that we find it curious that LLFP chooses to characterize its application for the Ogoki license as some kind of joint venture.

39. There is no doubt, however, that there is more (at least apparent) substance to arrangements eventually entered into between LLFP and GFN. Sometime after being elected chief of GFN in August of 1993, Gabriel Echum left his position with MFN. Thereafter Chief Echum and Inglis (with the involvement of others as well) began a series of discussions and negotiations which culminated in an agreement between GFN and LLFP which was executed on November 15, 1993.

40. Again, it is not necessary for us to review the terms of this agreement in great detail. Briefly, it provides for employment and training opportunities for citizens of GFN in the Longlac mill. It also recognizes the importance of various traditional economic activities to citizens of GFN and, in a sub-agreement sets out certain scheduling provisions designed to accommodate those activities. The agreement also obliges GFN to directly or indirectly assist with arrangements between MNR and LLFP for the supply of timber for the mill. There was some controversy, at least in the questioning of some witnesses, as to whether this agreement confers benefits on native persons generally or is limited to citizens of GFN. While it is not necessary for us to resolve this question, we would observe that the agreement is obviously between LLFP and GFN (the latter referred to therein as "FIRST NATION") and Appendix "A" of the agreement explicitly defines

“citizen” as a citizen of GFN. Some confusion is clearly generated, however, by the fact that although the agreement explicitly refers to GFN, a party signatory, as “FIRST NATION”, the definition section also provides that “FIRST NATION” “means a “Band” represented by the “Council of the Band” as defined in *The Indian Act*, R.S.C. 1991 C. I-6...” In any event, even assuming that the agreement confers benefits on only GFN citizens, the evidence was uncontradicted that, in the limited hiring which had taken place by the time of the hearing (limited essentially to the three shift operations of the planer mill), most employees came from GFN but some citizens of a native band other than GFN were hired.

41. Within approximately two weeks of the agreement between GFN and LLFP, LLFP entered into a voluntary recognition agreement with the Association. Six days later, on December 8, 1993 the Association and LLFP executed a document styled “WAGE AGREEMENT”. Both of these latter documents were signed on behalf of the Association by Scott Echum, son of Chief Echum.

VI

42. During the course of argument the Board was referred to numerous of its previous decisions including *Raymond Cote*, [1968] OLRB Rep. Mar. 1211; *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691; *Norjohn Contracting Limited*, [1978] OLRB Rep. May 438; *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *I.G.A.*, [1984] OLRB Rep. Apr. 604; *Valencia Foods*, [1984] OLRB Rep. May 773; *Keele-Wilson Supermarket Limited*, [1985] OLRB Rep. Mar. 425; *Canada Safeway Limited*, [1986] OLRB Rep. Mar. 305; *New Dominion Stores*, [1989] OLRB Rep. May 473; and *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. Apr. 281. We have found the last mentioned case, to which will refer as *Accomodex*, to be most useful and instructive since it contains the most recent and comprehensive review of the Board’s approach and the evolution of its jurisprudence with respect to the application of section 64 of the Act.

43. LLFP argues that the transaction between it and Kimberly Clark, while undoubtedly a sale of assets, was not the sale of a business. In this respect it relies on the fact that, even apart from any questions of wood supply or licensing requirements, the sawmill was incapable of immediate operations without significant maintenance overhaul and capital improvements. From this perspective LLFP bought a mere collection of assets and not a “going concern”. LLFP also urges us to consider the significant hiatus, a period in excess of seven years between the closure of the mill, its subsequent sale and current revival. Finally, we are pointed to the agreement/involvement of native groups, in particular GFN, in the enterprise as evidence which distinguishes LLFP’s current from Kimberly Clark’s former business.

44. The general nature of the determination performed by the Board in ascertaining whether or not a sale of a business has taken place has been set out in *Culverhouse Foods Limited*, cited above, at paragraph 16:

... we can summarize the principles appropriate for determining whether a particular transaction amounts to a sale of a business under [then] section 55 as follows: In each case the decisive question is whether or not there is a continuation of the business.... The most appropriate test to be applied in making this determination is whether the nature of the work performed subsequent to the transaction is the same as the nature of the work performed prior to the transaction.

... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether or not there is a continuation of the business. Additionally,

the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it was before, i.e. whether there has been a continuation of the business.

and in *More Groceries Limited*, [1980] OLRB Rep. Apr. 486 at paragraph 17:

The fundamental issue in cases of this kind is the threshold determination of the section: Has a business been sold? The term "sells" is defined to include "leases transfers; and any other money of disposition." This all-embrasive definition obviously reflects the labour relations policy considerations discussed generally above. To repeat, collective bargaining rights are not to be treated as co-extensive with commercial ownership and, to this extent, labour law policy seeks to insulate industrial relations from disruption by necessary and inevitable interaction in the market place. The term "business" on the other hand, is simply defined to include "a part or parts thereof." No similar exhaustive definition was attempted by the Legislature in recognition, we think, of the great diversity in commercial affairs and the resulting need for a case by case elaboration of the term in the light of labour law policy. A brief perusal of the many factual situations giving rise to the Board's jurisprudence bears testimony to the wisdom of this legislative choice. Accordingly, at the outset of reviewing a few of the cases that have applied the term "business" in the context of retail food stores, it should not be surprising to learn that the Board in determining whether a business has been sold has not deferred to the commercial documentation employed; has not been influenced by the use of intermediary agents to effect transfers; and has not made simple distinctions between asset and business dispositions. Rather, it has tried to make workplace assessments with respect to the continuity of a particular enterprise, activity, or service arriving at conclusions that a court of law in a commercial matter might not arrive at, but conclusions which are fair to both the statute and context under review....

and, more recently in *Accomdex*:

55. The instrumental approach to successorship suggests that bargaining rights are attached to an economic vehicle - the mechanism, resources or facilities by which the undertaking serves its purpose - rather than the purpose itself, the employees, or their work. Bargaining rights attach to the business undertaking. The Board then tries to determine, from a labour relations perspective, whether the transfer and continuation of some facet or facets of that undertaking, warrants a continuation of bargaining rights - for, of course, when interpreting section 64, the Board has to keep in mind its purpose and effect. The Board tries to reach a result which is fair to both the statute and the context under review - that is, a result that appears to be called for to remedy the mischief for which section 64 was passed. That mischief is not the loss of work or work opportunities, but rather the disruption of bargaining rights which would flow from a change in the ownership but continuation of all or part of the elements that make up the business.

56. As a result of section 64, bargaining rights are not coextensive with commercial ownership or the continuing identity of the owner, nor does it matter how the new owner comes to have possession of the instruments necessary to carry on all or part of the functions of the predecessor. Bargaining rights continue with a continuation of the business undertaking or a part of it. The cases explore just what those instruments or elements of the business are, and what can be said to be the essence of the undertaking - land, equipment, location, employee skills, licences, patents, etc. They consider, from a labour relations perspective, whether a sufficiently-coherent grouping of those things has been transferred so as to warrant a continuation of bargaining rights.

45. The questioning of the utility of simple distinctions between asset and business dispositions has also been more recently echoed in *Accomdex*, where the Board observed at paragraph 45:

... we do not think that it advances the analysis very much to describe the transaction under review as a mere "sale of assets". It certainly involves that; but even from a purely commercial law perspective, one way of buying a business is to purchase its assets. As Arthur Scaee observed in his text, the *Income Tax Law of Canada* (5th ed.):

Although businesses may be consolidated in a number of different ways, e.g. by-an amalgamation or winding up, there are only two methods by which a business can actually be bought or sold, namely the purchase and sale of either assets or shares.

A commercial lawyer would hardly consider it a novel proposition if it were suggested that a sale of a business could be accomplished by an asset transaction, or that someone could go into business by acquiring someone else's business capacity. To describe what has occurred here as an asset transfer, simply begs the question of whether there has nevertheless been a "sale" of all or "part" of the [predecessor's] business, for collective bargaining purposes under the *Labour Relations Act*.

46. What exactly did LLFP purchase? Was it all or part of Kimberly Clark's business? We think so. In arriving at this conclusion we have considered a number of factors. The nature of the work LLFP has been doing and intends to do is virtually indistinguishable from that formerly performed by Kimberly Clark. LLFP has demonstrated no intention to operate anything other than a sawmill on the Longlac site. It is perhaps less than surprising to suggest that where all of the remaining assets associated with a sawmill operation in a relatively remote area are purchased, one might well expect less potential for varying the fundamental nature of the enterprise than when, say, a building housing a retail food outlet is purchased in an urban setting.

47. We have considered as well the reality of the transaction in question. Mr. Inglis acknowledged that the values assigned to the various assets in the sale agreement were arrived at by Kimberly Clark. LLFP, in deciding whether or not to enter into the transaction, was more concerned with the total purchase price than with the valuation done of the enumerated assets. Thus, it is clear that the particular values assigned to various assets, while no doubt important for income tax purposes, may be less than authoritative. For example, Mr. Inglis testified that the slasher, valued at \$7500 had absolutely no commercial value. It is clear that LLFP was not concerned with whether or not it was paying a fair price for individual assets, but rather with whether they were content with the purchase price in relation to the total package. In this respect, it is particularly significant that the asset purchase agreement dealt with something of great importance and value to LLFP, wood supply. And although the agreement contemplates that, subject of course to MNR approval, Kimberly Clark will surrender its cutting rights to Nakina in favour of LLFP, no specific value is assigned to this aspect of the transaction. Mr. Inglis acknowledged that obtaining timber limits is a prime objective of any operator dealing with a sawmill operation.

48. We have already indicated that the cost to LLFP, including both the purchase price and the contemplated capital improvements, was significantly less than the cost of constructing an entirely new mill. Mr. Inglis also testified that LLFP had determined that, as a fallback plan if it was unable to ultimately secure the needed licenses and wood supply, it could remove various equipment from the Longlac site and integrate it into other Buchanan sawmill operations. What was not considered as an option was the construction of a new mill. Mr. Inglis acknowledged that construction of a new mill would not be a viable option; timber supply would be a serious problem; MNR would require that the Longlac mill be supplied first and there is insufficient wood supply for 2 mills in the area. That assessment of MNR policy is corroborated by other evidence; in correspondence to MFN an MNR official explicitly advises that any business plan filed by MFN for MNR approval regarding development of the Ogoki area must include a commitment to supply the Longlac sawmill with wood. In other words the capacity to undertake a sawmill operation in the area was wholly dependent on either purchasing or eliminating the Longlac mill.

49. We have also considered LLFP's submission that what it purchased was not a "going concern" and that the hiatus in excess of seven years between the closure and sale is significant. We adopt the following views articulated in *Accomodex*:

72. In cases which arose when the economy was buoyant, or transactions involved a whole, ongoing business, the Board once tended to focus on the dynamic quality of a business or its operation as a "going concern". If that dynamic quality was lacking, the Board was inclined to hold that there had been no transfer of a business but merely a disposition of assets. In more recent years and more troubled economic times, the absence of this dynamic quality has been accorded less significance.

73. Quite apart from questions of successorship, it has become much more common in recent years for businesses (or parts of them) to shut down for periods of time and lay off employees, then reopen again when the market improves - without anyone suggesting that the union's bargaining rights or the employees' recall rights, for that matter, have disappeared. In this era of corporate "restructuring", it has also become much more common for businesses to discontinue or hive off portions of their operation or undertaking, which then becomes the nucleus or even the entire undertaking of the "new" business organization. If instead of reopening on its own, or reviving this commercially-moribund portion of the operation, it was transferred to someone else - as increasingly happened through receivers - it was much less clear than it once might have been, that bargaining rights should disappear merely because that portion of the idle undertaking was now owned by someone else - especially since the purpose of section 64 is to eliminate the significance of the fact that a new legal entity owns the "things" that have been transferred. Clearly there is a potential tension between commercial law considerations, a layman's view of the "business", and the objectives reflected in the *Labour Relations Act*, but it has become much less evident in recent years that this tension should be resolved by the Board "reading into" the statute the words "as a going concern", after the word "business" in section 64(2). The concept of a "going concern" and the words "as a going concern" are not unknown in law, but in drafting section 64, the Legislature has not injected that phrase and it is not intuitively obvious that the Board should be doing so as a matter of interpretation. This is not to say that the absence of ongoing activity is irrelevant; merely that it may not be determinative.

74. If a new investor bought the controlling shares in a dormant company with idle assets and brought them to life with an injection of capital, there is little doubt that the union's bargaining rights would continue in respect of that company now that it had become active. A union would not need to invoke section 64 because, although there had to be a "sale of a business" in common parlance and commercial law terms, the legal entity with which it has bargaining rights - the "owner" of the assets - would be unchanged. Bargaining and collective agreement rights would continue. Should the result be different from a collective bargaining point of view, if the same investor used the same funds to purchase the assets themselves rather than controlling shares in the corporate envelope, but, as before, revived the business as a going concern under new ownership?

50. Similarly, we are not persuaded that the admittedly substantial hiatus between closure and sale in this case is either determinative or as significant as it might be in the context of a different constellation of facts. As the Board observed at paragraph 22 of the *New Dominion Stores* case, cited above:

... hiatus between closure and opening is not determinative, but only one factor. The fact that the hiatus between the closure of Dominion store #986 and the opening of the A. & P. store was quite long, twenty-two months, does not itself mean that the business of the former has not been transferred to the successor. *There is no temporal bright line beyond which bargaining rights will not transfer.*

[emphasis added]

51. In considering in particular the impact of the significant hiatus in this case we must not lose sight of the peculiarities of the industry involved in this case and the significant differences

between it and the retail food industry, the locus of virtually all the cases relied upon by LLFP in relation to the issue. In this context we again find comments from *Accomodex* to be instructive:

69. The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably would affect the decision on the merits. Indeed, much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; and, quite frankly, the results in some of the cases are difficult to reconcile - reflecting, among other things: the quality of the evidence before the Board in particular cases (especially before and after the passage of what is now section 64(13)); the quality of the argument; and the evolution of the Board's jurisprudence as various panels, over the years, have assessed in new factual settings, the "mischief" to which section 64 was directed.

70. But to dismiss the difficulty so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of a business" finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "knowhow", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities, and in each of these sectors the nature of the business organization is little different. Yet in each case section 64 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish. To cite but one unusual example: in *Riverview Manor*, [1983] OLRB Rep. Sept. 1564 (application for judicial review dismissed February 5, 1985), the Board found that a licence to run a nursing home business was a critical part of that business, to which bargaining rights could attach, even though the purchaser of the licence later invested a substantial sum to build its own nursing home across town. In that highly-regulated business, the licence was viewed by the Board in that case as a key asset - as evidenced by the substantial sum that had been paid for it.

52. Hiatus may (or not) be an important factor in the sale of a retail business. Certainly, as the length of any hiatus increases, one would expect the value and importance of any goodwill associated with the predecessor to diminish perhaps to the point of extinction. Similar concerns could apply in respect of the value of the location of a retail sales business. There is no dispute, however, that factors such as goodwill, trademarks, accounts receivable, logos, or established customers were not significant in the context of the instant transaction. (In respect of the last factor we note that LLFP, like the former Kimberly Clark mill operation, will not be directly involved in marketing or sales of the lumber produced; those functions will be performed by a separate entity within the Buchanan organization.) In the context of the sale of a sawmill operation the absence of these factors is not surprising. The sawmill operation involves the harvesting and processing of precious natural resources in a context where the allocation and development of such resources is subject to strict government control. No one can simply commence to operate sawmill on a whim, something which, at least by comparison, it might be said is possible to do in relation to the operation of retail stores.

53. To the extent that comparisons are possible or helpful, we find the facts of the present case to be more similar to cases like *Riverview Manor*, cited in the last quoted passage from *Accomodex*, where the sale of business involved a sale of a licence; or *Culverhouse Foods Limited*, cited above, where the vendor's agreement to make efforts to insure a transfer of the licences issued by the Farm Products Marketing Board was part of the transaction; or *Provincial Fruit Company (Ottawa) Limited*, [1976] OLRB Rep. Nov. 830 where the purchase of a lease of floor

space at the Ontario Food Terminal was found to be a sale of a business than to the cases involving alleged sales of retail food businesses relied on so heavily by LLFP:

54. In the present case LLFP purchased all of the remaining assets associated with the operation of the Longlac mill. Included in that purchase, of course, was the mill itself and the premises on which it is found. In addition LLFP has purchased, to the extent that Kimberly Clark was capable of selling something it previously held, the timber rights to the Nakina area. More important perhaps, in view of MNR's approach, LLFP, by virtue of its ownership of the mill, has placed itself in a favoured position with respect to access to wood supply not only from Nakina but also from Ogoki. In these circumstances we have no hesitation in concluding, to use the language of many of the Board's cases, that what LLFP has purchased is the capacity to carry on the business formerly conducted by Kimberly Clark in relation to the Longlac mill. In other words, we are persuaded that the transaction between LLFP and Kimberly Clark was a sale of a business within the meaning of section 64.

55. We should comment briefly, since so much hearing time was devoted to it, on the significance of LLFP's dealings with various native groups. We must repeat first of all that any LLFP involvement with those groups did not even commence until after the asset purchase agreement had been executed. Without wishing to belittle the importance LLFP or the native groups may attach to these dealings, we are not satisfied that they are particularly germane to the fundamental nature of LLFP's business, certainly not to the extent that one would even consider a conclusion that, because of these dealings, LLFP's business differs from the former Kimberly Clark sawmill operation. LLFP has simply, as it is entitled to do, recognized that in the current political climate it may to its economic advantage to work in concert or at least be seen to work in concert with various native groups. Although Mr. Inglis seemed to have some difficulty at times in acknowledging what appears relatively obvious, the support of MFN and/or GFN may well assist LLFP in attaining its various objectives related to both sawmill and wood cutting licences. Neither did LLFP waste any time in promoting (or as the union, perhaps not unreasonably, suggests, misrepresenting the nature of) its "partnerships" with the two native groups. For our purposes, however, we find these arrangements of little interest or relevance in determining the issues before us.

VII

56. In summary then, we have not been persuaded that the union, at any point prior to the sale which is the subject of these proceedings, abandoned the bargaining rights it previously held in relation to Kimberly Clark's sawmill operation. There was, however, no collective agreement in force as between the union and Kimberly Clark at the time of the sale. We are satisfied that the transaction in question constitutes a sale of a business within the meaning of section 64 of the Act. Accordingly, we hereby declare that the union continues to be the bargaining agent in respect of the Longlac sawmill operations as if LLFP were Kimberly Clark.

57. The reasons for Board member Shamanski's dissent in this matter are unavailable at this time and will follow in due course at which time they will be distributed in the same fashion as the instant decision.

**2280-94-M IWA Canada, Applicant v. Leo Sakata Electronics (Canada) Ltd.,
Responding Party**

Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Unfair Labour Practice - Union seeking interim relief in connection with unfair labour practice complaint alleging that demotion of employee from group leader position violating the Act - Board directing that employee be reinstated to his position on interim basis pending final disposition of unfair labour practice complaint

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *O. McGuire* and *H. Peacock*.

APPEARANCES: *W. Dubinsky* for the applicant; *Donald B. Shanks* for the responding party.

DECISION OF THE BOARD; October 5, 1994

1. This is an application under section 92.1 of the *Labour Relations Act*.
2. The applicant commenced an organizing campaign of the respondent's employees on September 10, 1994. On September 18, 1994, Dana Lockwood, a group leader in the respondent's "automatic insertion room", asked employees, during working hours, to place their names on blank sheets of paper. Mr. Lockwood advised employees that the request stemmed from management. In reality, Mr. Lockwood was collecting names on behalf of the applicant for organizing purposes.
3. On September 20, 1994, the employer, having learned of Mr. Lockwood's behaviour and the reasons for it, demoted him from his position as group leader to that of "tester" on the assembly line. The employer alleged that Mr. Lockwood had misused his position of authority and had interfered with production. It stated that its response was intended to ensure that "such actions will not be repeated".
4. In an application under section 91 of the Act, the union alleges that the employer's conduct violates sections 2.1, 3, 65, 67(a) and (c), 71 and 82 of the Act, and requests, among other things, that Mr. Lockwood be reinstated to his position as group leader. Reinstatement is also sought in this application, on an interim basis.
5. At the hearing, the employer conceded that the application established an arguable case. In the main application, the onus will be on the employer to establish that its treatment of Mr. Lockwood was not motivated in whole or in part by anti-union animus. The employer argued, however, that the balance of harm in this application weighs in its favour.
6. The Board does not agree. The union has pleaded that the employer's conduct will have a "chilling effect" on its organizing campaign. It suggests that Mr. Lockwood's demotion will send a message to employees that expressions of support for the union will be penalized by the company, thereby inhibiting employees in the exercise of their statutory rights. In the Board's view, this is a reasonable inference to draw from the circumstances and, indeed, is supported by the Board's experience in certification and related matters (see e.g. *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019).
7. The Board is not prepared, however, to draw the inference requested by the employer that Mr. Lockwood's return to the automatic insertion room is likely to have any, or any appreciable, adverse impact on production. The declarations filed by the employer do not suggest, as the

employer maintains, any breakdown in the relationship between employees and Mr. Lockwood that would likely interfere with production if Mr. Lockwood were to be restored as the employees' group leader.

8. In the circumstances, therefore, the Board directs that the employer forthwith reinstate Dana Lockwood to his position as group leader, on an interim basis, pending the final disposition of the unfair labour practice complaint in Board File No. 2281-94-U.

9. The Board further directs that the respondent post the notice attached as Appendix "A" to this decision in prominent places in the workplace where it is most likely to be seen by employees interested in these proceedings, pending the resolution of the unfair labour practice complaint.

Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH A DIRECTION OF THE BOARD, ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO MAKE SUBMISSIONS.

THE BOARD HAS ORDERED LEO SAKATA ELECTRONICS (CANADA) LTD. TO REINSTATE DANA LOCKWOOD TO HIS POSITION AS GROUP LEADER IN THE AUTOMATIC INSERTION ROOM ON AN INTERIM BASIS UNTIL THE BOARD CONSIDERS THE REASONS FOR HIS DEMOTION. A HEARING BEFORE THE BOARD IS SCHEDULED TO BEGIN ON OCTOBER 13, 1994. THE PURPOSE OF THAT HEARING IS TO DETERMINE WHY DANA LOCKWOOD WAS DEMOTED.

IF THE BOARD DETERMINES THAT DANA LOCKWOOD WAS DEMOTED FOR A MISUSE OF HIS AUTHORITY OR AN IMPROPER INTERFERENCE WITH PRODUCTION, AND NOT BECAUSE OF LEGITIMATE TRADE UNION ACTIVITY, THIS ORDER WILL BE REVOKED AND THE COMPANY WILL NO LONGER BE REQUIRED TO EMPLOY HIM IN THE POSITION OF GROUP LEADER.

IF THE BOARD ULTIMATELY FINDS THAT MR. LOCKWOOD WAS DEMOTED BECAUSE HE WAS ORGANIZING ON BEHALF OF THE UNION, THE BOARD MAY CONFIRM HIS TEMPORARY REINSTATEMENT AND DIRECT THAT HE BE COMPENSATED FOR ANY EARNINGS LOST AS A RESULT OF HIS DEMOTION.

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH ARE PROTECTED BY LAW:

AN EMPLOYEE HAS THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER OWN CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

AN EMPLOYEE HAS THE RIGHT TO OPPOSE A TRADE UNION, OR SUBJECT TO THE UNION SECURITY CLAUSE IN THE COLLECTIVE AGREEMENT WITH HIS OR HER EMPLOYER, REFUSE TO JOIN A TRADE UNION.

AN EMPLOYEE HAS THE RIGHT TO CAST A SECRET BALLOT IN FAVOUR OF, OR IN OPPOSITION TO, A TRADE UNION IF THE ONTARIO LABOUR RELATIONS BOARD DIRECTS A REPRESENTATION VOTE.

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED BY AN EMPLOYER OR BY A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT TO REMAIN NEUTRAL, TO REFUSE TO SIGN DOCUMENTS OPPOSING THE UNION OR TO REFUSE TO SIGN A UNION MEMBERSHIP CARD.

IT IS UNLAWFUL FOR EMPLOYEES TO BE PENALIZED IN ANY WAY FOR THE EXERCISE OF THESE RIGHTS. IF THIS HAPPENS, A COMPLAINT MAY BE FILED WITH THE ONTARIO LABOUR RELATIONS BOARD.

IT IS UNLAWFUL FOR ANYONE TO USE INTIMIDATION TO COMPEL SOMEONE ELSE TO BECOME OR REFRAIN FROM BECOMING A MEMBER OF A TRADE UNION, OR TO COMPEL SOMEONE TO REFRAIN FROM EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

NOTHING IN THE LABOUR RELATIONS ACT AUTHORIZES ANY PERSON TO ATTEMPT AT THE PLACE AT WHICH AN EMPLOYEE WORKS TO PERSUADE THE EMPLOYEE DURING THE EMPLOYEE'S WORKING HOURS TO BECOME OR REFRAIN FROM BECOMING OR CONTINUING TO BE A MEMBER OF A TRADE UNION.

LEO SAKATA ELECTRONICS (CANADA) LTD.

PER:
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

THIS NOTICE MUST REMAIN POSTED UNTIL THE UNFAIR LABOUR PRACTICE COMPLAINT IN BOARD FILE NO. 2281-94-U IS RESOLVED.

DATED THIS 5TH DAY OF OCTOBER, 1994.

1691-94-R; 2096-94-U Christian Labour Association of Canada, Applicant v. Lutheran Nursing Home (Owen Sound), Responding Party v. Rosanne Gillard and Sandra Marshall, Objecting Employees; Christian Labour Association of Canada, Applicant v. Rosanne Gillard and Sandra Marshall, Responding Parties

Certification - Charges - Evidence - Fraud - Intimidation and Coercion - Membership Evidence - Petition - Practice and Procedure - Timeliness - Union's certification application sent by registered mail on August 11 and employees' petition received by private courier at Board's office on August 12 - Rules of Procedure providing that date of filing is date document received by Board or, if mailed by registered mail, date on which it is mailed as verified by Post Office - Combined operation of section 8(4) of the Act and Board's Rules making petition untimely - Board dismissing objecting employees' allegations concerning union's collection of membership evidence for failure to make out *prima facie* case - Board declining objecting employees' request that Board exercise its discretion under section 8(3) of the Act to order representation vote - Certificate issuing

BEFORE: *Robert Herman*, Vice-Chair.

APPEARANCES: *Elizabeth Forster, Ed Grootenboer, Ed Bosveld, Betty Westrick and Mary Charlton* for the applicant; *John H. E. Middlebro, Lloyd Wiseman, Sylvia Statham and Joan Robinson* for the responding employer; *Mona Anis, Rosanne Gillard, Sandra Marshall, Sandra McLeod and Yvonne Chrysler* for the group of employees.

DECISION OF THE BOARD; October 18, 1994

1. This is an application for certification and a related complaint filed pursuant to the provisions of section 91 of the *Labour Relations Act*.
2. At the commencement of the hearing on September 19, 1994, the applicant advised that it was no longer relying upon the provisions of section 9.2 of the Act in support of its certification application, and that it was no longer asserting that the responding parties had breached sections 65, 67, or 72 of the Act. In the result, it was asserting that the responding parties had breached section 71 of the Act.
3. A petition (statement opposing the certification of the applicant) had been filed by various individuals. There was a dispute over whether it had been filed in a timely manner and could be considered by the Board, and the Board first dealt with this issue. All parties agreed that in dealing with the timeliness issue, the Board could rely upon the facts as asserted by the petitioners, or as otherwise agreed amongst the parties.
4. In the early summer of 1994, Ms. Gillard, one of the petitioners, took steps to learn of the mechanism for opposing the union. She went to the library and read material there, and learned that employees opposed to a union could file something called a "petition". She subsequently phoned the Lawyer Referral Service administered by The Law Society of Upper Canada, and was referred to a lawyer located in Barrie, Ontario. She had some difficulty getting through to the lawyer in Barrie, and never did meet him. Instead, she saw a lawyer in Owen Sound, on August 10, 1994 at 4:00 p.m.
5. The following day, August 11, 1994, she received written advice from that lawyer as to how to go about filing a petition with the Board. That written advice did not include any indication

that Ms. Gillard ought to have filed any petition by registered mail, or that she not use private courier service.

6. Also on August 11, 1994, the certification application was mailed by registered mail by the applicant to the Board. That evening, Ms. Gillard caused the petition, containing a number of signatures of employees opposed to the union, to be sent by private courier to Toronto, to the Board premises. Ms. Gillard put the petition into the hands of the courier at 7:30 p.m. on August 11, 1994. The petition was delivered and received by the Board the next day, August 12, 1994. The application for certification, sent by registered mail on August 11, was received by the Board on August 15, 1994, three days after the petition had been received by the Board. It was given an application date of August 11th, reflecting the date on which it had been mailed registered. This was done in accordance with Rule 8 of the Board's Rules.

7. Because the application date was August 11th, and because the petition was not received until August 12th, the petition was treated as untimely, pursuant to section 8(4) of the *Labour Relations Act*.

8. Counsel for the intervening employees asserted that the petition was timely on three grounds: first, there was no policy reason or rationale for applying or interpreting section 8(4) of the Act, in a manner that would lead to a finding that the petition here was untimely; second, the petition had in fact been "filed or presented" by the application date; third, in any event, the Board had authority under Rule 22 to waive strict compliance with the Rules, and thus ought to waive such requirement and conclude that the petition was timely.

9. After hearing the submissions of the parties, and after reserving its decision on the issue overnight, the following day the Board orally ruled as follows. The reasons have been expanded upon slightly here.

"1. The question for the Board is whether the petition before it was filed in a timely manner. If the petition was not timely, then it will not be considered by the Board.

2. The circumstances are such that the application for certification was mailed by registered mail on August 11, 1994. Also on August 11, the petition was given over to a private courier service in Owen Sound, for delivery to the Board. This method was chosen by the petitioners to ensure quick and safe delivery, and because the petitioners were unaware, although they had made significant efforts to become familiar with the Board process, of the Board's Rules. Specifically, they were unaware of the provisions of Rule 8, which reads as follows:

8. The date of filing is the date a document is received by the Board or, if it is mailed by registered mail addressed to the Board at its office at Toronto, the date on which it is mailed, as verified in writing by the Post Office. However, the date of filing in cases brought under sections 11.1, 41, 73.1, 73.2, 92.1, 92.2, 93, 94, 95, 126 and 137 of the Act is the date the document is received by the Board.

3. On August 12, 1994, the petition was actually delivered to the Board, by the courier company. Three days later, on August 15, 1994, the application for certification was actually received by the Board.

4. Pursuant to the provisions of Rule 8, since the application for certification had been sent to the Board by registered mail, the application was assigned an application date of August 11, 1994, the date on which it was mailed registered.
5. Since the petition had not been mailed by registered mail, but had been delivered by private courier, it was treated as having been "filed" on the day it was actually received, August 12, 1994, the day after the application date.
6. Upon receipt of the petition on August 12, 1994, the Board's staff advised the petitioners that their petition was untimely.
7. This in turn led to the issue before the Board, as to the timeliness of the petition.
8. The Board might briefly refer to the statutory and regulatory provisions on point. Pursuant to section 8(4) of the *Labour Relations Act*, petitions must be "filed or presented" prior to or on the application date of the certification application. Section 8(4) reads as follows:

8.- (4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

It is a statutory requirement therefore that renders petition untimely if they are not received on or before the application date.

9. The Board also has various Rules which address the timing of materials, including, for example Rules 8 and 47. Here, it is particularly the provisions of Rule 8 that apply.
10. The Board acknowledges that in a sense, but for the provisions of Rule 8, this petition would have been timely, since (but for Rule 8) the application for certification would not have been deemed to have been filed on August 11, when it was mailed registered mail, but would have been filed on the day of actual receipt of August 15, 1994.
11. It is important however to understand that Rule 8 speaks generally to filings with the Board, and not specifically to petitions or applica-

tions for certification. In essence, it states that a filing date, for many types of documents filed (including both applications for certification and petitions opposed to certification) is the date on which something is actually received, or for one prescribed alternative, registered mail, on the date the document or material is mailed by this method.

12. The reason for this Rule is primarily to accommodate the interest of parties who are located out of Toronto. It is designed to facilitate their ability to file documents in a timely manner, without having to incur the cost of actual delivery to the Board's offices in Toronto, whether such delivery be in person or through courier. Thus Rule 8 applies evenly to all parties, whether unions, employers, or individual employees.
13. But the Board has determined, and implemented through its Rules, that it is only through registered mail, utilizing the services of Canada Post, that the result will be that the filing date will be other than the date of actual receipt by the Board.
14. The Board has concluded, after decades of experience, that a bright line clear test is needed with respect to determining the timeliness of documentary material. This is particularly true and necessary in light of the recent amendments to the Act and, more specifically, the provisions of section 8(4) of the Act, which give such importance to the timing of materials filed on or before the application date.
15. Again, the Rule is not designed to penalize petitioners, but rather to enhance their ability to participate.
16. The hardship for petitioners is not Rule 8; it is section 8(4) of the Act. Rule 8 does not take away a method of filing from petitioners, it only provides an additional method beyond the obvious method of filing through actual delivery to the Board. Here, had the petitions been filed by registered mail, they would also have been deemed to have been filed on the date on which they were mailed registered.
17. The Board recognizes that, because of the provision of Rule 8 here, the applicant obtained an application date of August 11, 1994, and the petitioners were likely unaware of this application date at the time they sent their materials to the Board. Indeed, the Board as well would have been unaware of the application on the application date, and, as with the petitioners, only became aware of it on August 15, 1994.
18. But this is a problem generally for petitioners in certification applications. The applicant union has sole control of picking the application date, and by virtue of the provisions of section 8(4) of the Act, the application date is now the cut-off date for the filing or presenting of petitions. This problem however, exists for petitioners whether or not an applicant utilizes registered mail as its method of filing an application. Here, had the applicant filed its application by actual

delivery on August 11, the same problem would have existed for the petitioners.

19. The petitioners here rely upon the effort they made to learn of the correct way to file their petition, and the fact that they were unaware of the registered mail option. While the Board is sympathetic to their circumstances, parties are expected to know the provisions of the applicable law, and this is not a reason for the Board to conclude that a petition that is otherwise untimely should be found to be timely.
20. Turning to the specific arguments raised by the petitioners, they first assert that the filing meets the spirit (or wording) of Rule 8, because the use of a private courier is akin to the use of registered mail, and that there is no valid reason here to reject the petition as untimely. In this respect, they rely upon the Board's decision in *Saxon Athletic Manufacturing Inc.*, [1990] OLRB Rep. May 618, a case which arose under the predecessor Rules (which had a Rule akin to the current Rule 8). There, the Board held that utilization of Canada Post priority post system qualified as forwarding something by registered mail, even though the Rule only referred to "registered mail".
21. The Board is not persuaded by this argument. The intent of Rule 8 is that Canada Post is to be utilized, rather than a private courier system. The decision in *Saxon* is consistent with this. To the Board, it does make a difference that the courier service selected is the public post system rather than private couriers. Private couriers are more varied and flexible in their arrangements and procedures, including their procedures for dating and delivering material. They may perhaps be more flexible with respect to satisfying a customer's particular needs. In short, there is no consistency in their practices, and thus the Board is not prepared to rely on such practices to the same extent as if materials were sent by Canada Post.
22. Use of a private courier system of course remains permissible; it is only that the filing date will remain the date of actual receipt by the Board.
23. The intervening employees also argued that their petition was timely in that it had been "filed or presented", within the meaning of this phrase in section 8(4) of the Act, on or before the application date. They argued that putting it into the hands of the private courier service, and thus doing all that they could to ensure its delivery, constituted filing or presenting it, and as this had taken place on August 11, the application date, the petition was in fact "filed or presented" on or before the application date.
24. Given the context of this phrase in section 8(4) of the Act, where the application date is given such paramount significance in the legislation, the Board cannot find that "presented" means putting material into the hands of a private courier. To the contrary, "filed or pre-

sented” means filing with or presenting materials to the Board, and not to the method or mechanism of carriage or delivery.

25. The intervening employees also argued that the Board ought to apply the provisions of Rule 22, to relieve them from the strict requirements of Rule 8 and any other Rules which would render the petition untimely here. Rule 22 reads as follows:

22. The Board may relieve against the strict application of these Rules where it considers it advisable.

26. The Board accepts that it has the authority to find the petition here to be timely. However, for the Board to so find would not simply be relieving from the requirements of Rule 8 in the circumstances, but would effectively be to change the provisions of Rule 8. Relief from the requirements of the Rules is appropriate in a number of circumstances, including where the Rules themselves set a time for responding, but a party with reasonable cause is unable to comply with the set time periods. Here, however, it is the *Labour Relations Act* which demands that a petition be filed by the application date, not the Rules. Rule 8 only indicates that if anything is sent by registered mail, then the date of filing is when those materials are mailed.
27. It is not apparent what relief we could appropriately give here. If the application date was changed, then the petition would be timely. The Board could accomplish this by nullifying the Rule for the applicant, so that the application date is the date of actual receipt, and not when mailed registered. But this relief would be unwarranted. To do so would mean the petitioners would have effectively determined the application date of a certification application, rather than the union, and would mean that the union here, which reasonably relied upon Rule 8, would have its provisions rendered inapplicable for no reason attributable to its own conduct. This is not an appropriate result.
28. If the application date is therefore to remain at August 11, as it should in the Board’s view, what relief against the Rules can be given by the Board that would render the petition timely? There is no Rule that the Board could give relief from, which would render the petition timely without at the same time changing the application date. If the application date remains unchanged, then declining to apply Rule 8 to the petition would still mean the petition is untimely. It would still have been filed the day after the application date.
29. In effect, the intervening employees ask that the Board accept that the filing occurred on a date other than it really was filed, or alternatively, that the Board nullify or change the application date of the entire application.
30. Neither response is appropriate here.
31. Again, it appears that the intervening employees’ real quarrel is with the provisions of section 8(4) of the *Labour Relations Act*, and not

with the Board's Rules. If there is any unfairness or hardship created here, it is in the Board's view not the Rules which create it, but the Act. It is the Act which makes this petition untimely.

32. In balance, the Board concludes that the petition here is untimely, as it was neither received by the Board nor mailed registered by the application date. Therefore, by virtue of section 8(4) of the *Labour Relations Act*, the petition is untimely, and will not be considered further by the Board".

10. A number of employees also filed allegations concerning how the membership evidence had been collected by the union. The union submitted that the allegations pleaded, even if true and provable, did not constitute a *prima facie* (or arguable) case, and the union asked that the allegations accordingly be dismissed.

11. For purposes of dealing with this issue, the Board accepted as true and provable the facts as pleaded by the intervening employees. After hearing the submissions of the parties, the Board orally ruled as follows:

1. The Board is satisfied that there is no *prima facie* case with respect to any of the matters alleged by the intervening employees.
2. The Board takes as true and provable all the facts as pleaded by the employees. However, the employees cannot rely upon any other facts, other than those that have been pleaded, as it is incumbent upon parties to plead sufficient facts to establish an arguable, or *prima facie*, case. Thus, if it is not asserted that certain conduct occurred before the application date in this proceeding, then the Board will not conclude that certain conduct did occur prior to this date. This is particularly true in light of the specific direction from a previous panel of the Board that the intervening employees plead all the particulars (material facts upon which they intended to rely with respect to their allegations).
3. The Board does not propose to go over each specific fact individually.
4. The Board notes that all parties had before them a chronology of when the membership cards relied upon by the union had been signed. This chronology was cross-referenced by the Board to the actual cards to ensure its accuracy.
5. Turning first to the facts set out in paragraph 1 of the September 7, 1994 typed letter, it appears that these events occurred sometime shortly before late July, 1994. This is apparent given the further particulars with respect to the same events set out in paragraph 2 of the letter of September 15, 1994 from counsel for the intervening employees. No specific people are named, other than Mary McBride. Either Ms. McBride did not sign a card, or if she did, she did so prior to July. There is also very little detail of the allegations. Thus, even if Ms. McBride did sign a card, the impugned conduct

could not have affected the signing of her card. The conduct occurred after she signed.

6. The material facts set out in paragraph 2 of the September 7 letter occurred after the application date, and therefore could not have affected the collection of the memberships.
7. With respect to the material facts in paragraph 3 of that letter, the individual involved either did not sign a card, or signed long before the events complained of. Again, given the timing of the events, and the detail of those alleged, the conduct in question was not sufficient to cast doubt upon the memberships relied upon by the union.
8. The material facts set out in paragraph 4 of the letter of September 7 deal with an individual's request that she be given her card back by the union. However, a union is not required to return to an employee a card that she has signed. There is no allegation that the employee in question did not sign, only that the union refused to return to her the card she had signed. These facts do not undermine the reliability of the cards.
9. The material facts set out in paragraph 5 of the letter of September 7 occurred too late in time to effect the reliability of any of the membership cards.
10. The material facts set in paragraphs 6, 7 and 8 of the letter of September 7, and in the hand-written note that was also forwarded to the Board, are not such that they would undermine or cast doubt upon any of the memberships filed by the union.
11. In summary, with respect to the contents of the September 7 letter, and the hand-written note, and all of the contents of the letter of September 15, 1994 (other than paragraph 1 to which we will refer below), there is either insufficient detail provided, or the material facts that are pleaded are not such as to cast doubt upon the memberships relied upon by the union. In many cases, this is because the events occurred after the cards had been signed, or alternatively, filed with the Board.
12. With respect to the remaining allegation, that contained in paragraph 1 of the letter of September 15, 1994, memberships were still being collected by the union at the time these events occurred. Even so, it is not clear why these events ought to lead the Board to doubt any of the memberships filed by the union.
13. In effect, the union told employees that if it was not certified, there would be lay-offs in the workplace and that one specific employee, Janice Armstrong, would be among the first to be laid-off.
14. Promises of this sort are part of an organizing campaign. Unions regularly tell employees why they ought to opt for union representation, including statements such as that made here. When a union

makes these statements, it is not in the same position as an employer threatening lay-offs of its employees. An employer is able to implement such action. A union is not in a position to either threaten or intimidate employees when it tells employees, in order to encourage them to sign up for the union, that there may or will be lay-offs if there is no union representing them.

15. Apart from the fact that this may actually be true in a given situation, in the Board's view it is part and parcel of an organizing campaign, and is the sort of campaigning that employees are able to assess and evaluate. Employees are able, in the face of such assertions, to determine whether they wish to sign a membership card or an application for membership. Such statements by unions are not a reason to discount any memberships which they may have obtained.
16. For all these reasons, the allegations are dismissed for failing to disclose an arguable, or *prima facie*, case."

12. After the Board had ruled on the two matters set out above, the intervening employees asked that the Board exercise its discretion under section 8(3) of the Act to order a representation vote, notwithstanding that the union had filed membership support of over fifty-five percent of employees in the bargaining unit as of the application date.

13. The Board orally ruled that it would not direct such a representation vote in the circumstances. The scheme of acquiring rights under the *Labour Relations Act* is through the collection of and filing of membership cards (or applications for membership) in a union. While the Board may have a discretion to direct that a representation vote be held, it should exercise that discretion in a manner consistent with the intent and purpose of the Act, where the predominant scheme is to refer to and rely upon the filing of membership cards. Whatever the arguments in favour of a representation vote in every proceeding, in Ontario there need not be a representation vote in each case, but only in certain narrow circumstances.

14. Here, the Board concluded that there was no reason to direct a representation vote, given the level of membership support and the reliability of the memberships filed by the union. Accordingly, the Board ruled that it would not direct such a vote in the circumstances.

15. After this ruling, the applicant union withdrew its section 91 complaint.

16. There were no other issues in dispute between the parties.

17. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

18. Having regard to the agreement of the parties, the Board further finds that:

all employees of Lutheran Nursing Home (Owen Sound) in the City of Owen Sound, save and except supervisors, persons above the rank of supervisor, office, clerical and maintenance staff, persons employed in a cooperative education program and students employed during the school vacation period,

constitute a unit of employees of the responding party appropriate for collective bargaining.

Clarity Note: For purposes of clarity, the parties are agreed that persons employed in cooperative

education programs for terms not exceeding six months will be excluded and students employed during the summer vacation period will be limited to no more than two at any one time.

19. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on August 11, 1994, the certification application date, had applied to become members of the applicant on or before that date.

20. A certificate will issue to the applicant.

1837-94-R Garage Workers Maple Lodge Farms Ltd., Applicant v. United Food and Commercial Workers International Union, Local 175, AFL-CIO-CLC, Responding Party v. **Maple Lodge Farms Ltd.**, Intervenor

Evidence - Petition - Practice and Procedure - Termination - Applicant not providing Board with detailed evidence of origination of petition, nor any evidence with respect to circulation of petition or continuity of carriage of petition after it was received by employee collecting signatures and then to the Board, nor any evidence of circumstances in which each and every signature collected - Union's non-suit motion granted - Application to terminate bargaining rights dismissed

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *R. Sloan* and *K. Davies*.

APPEARANCES: *Maxwell Kirby*, *Syed Hussain* and *James Rodgers* for the applicant; *Kelvin Kucey* for the responding party; *Marilyn Silverman* and *Debra May Kee* for the intervenor.

DECISION OF THE BOARD; October 4, 1994

1. The applicant has applied to the Board under section 58 of the *Labour Relations Act* for a declaration that the responding party (hereinafter also referred to as the "union") no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. The bargaining unit which is the subject of this application consists of:

all employees of Maple Lodge Farms Ltd. employed in its garage at R.R. #2, Norval, Ontario, save and except general garage foreman, persons above the rank of general garage foreman, driver trainer, and office and clerical staff.

3. It was common ground among the parties that this application was timely. However, a hearing was held on September 19, 1994, to determine the issue of the voluntariness of the petition filed by the applicant in support of this application. Having heard the evidence of the applicant and having considered the submissions of the parties, the Board ruled orally as follows:

Having heard the submissions of the parties, we hereby grant the non-suit motion made by the responding party. This application is dismissed. Our reasons will follow.

4. These are the reasons for that decision.

5. The relevant sections of the Act for the purposes of this termination application are as follows:

58.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at the time that is determined under clause 105(2)(j.1) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

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6. The Board has established that the burden of proving, on the balance of probabilities, that a petition represents the voluntary expression of the employees who signed it, lies with the applicant. In order to satisfy its onus, the applicant is required to provide the Board with credible evidence regarding the origination, preparation, and circulation of the petition (see *Hully Gully London Ltd.*, [1990] OLRB Rep. Feb. 160). The precise nature of the evidence required by the Board was set out in *Hully Gully London Ltd.*, *supra*, as follows:

14. The Board has declined to accept petitions as voluntary expressions of employee wishes where there is inadequate first hand evidence regarding the origination and preparation of the petition (see *Dynasty Inn*, [1986] OLRB Rep. Mar. 326; *Markham Hydro Electric Commission*, [1984] OLRB Rep. Oct. 1481; *Upper Canada Glass*, [1981] OLRB Rep. Aug. 1181; *Intercity News Company Limited*, [1981] OLRB Rep. Feb. 171); where there are gaps in the evidence regarding ongoing custody of the petition (see *Canada Dry Bottling Company Ltd.*, [1987] OLRB Rep. Mar. 337; *Mac-Wood Machine Limited*, [1975] OLRB Rep. Nov. 842); where there is inadequate or incomplete evidence regarding the circulation of the petition and the circumstances surrounding *each and every* signature thereon (*Skelhorns Bus Line Limited*, [1986] OLRB Rep. Oct. 1435). Petitions have also been rejected where, absent any evidence or allegation of misconduct, the evidence offered on behalf of the applicant is internally inconsistent, unreliable, or otherwise lacking in credibility (see *Custom Foam Specialities Limited*, [1986]

OLRB Rep. Dec. 1680; *Fisher Scientific Limited*, unreported October 19, 1989; *Arosan Enterprises Ltd.*, unreported January 9, 1990).

7. Mr. Syed Hussain appeared on behalf of the applicant group and was represented by his Agent at Law, Mr. Kirby. Mr. James Rodgers and Mr. Hussain gave evidence on behalf of the applicant group. It was Mr. Hussain's evidence that he had become involved in this application because some employees approached him and asked him if he would help them to decertify the union. Mr. Hussain drafted the petition, but he was not involved in the circulation of the petition or the collection of the signatures. Mr. Rodgers testified that Mr. Hussain had asked him to circulate the petition. He met with employees in the parking lot of the workplace, which is outside the working premises. While Mr. Rodgers had collected all of the signatures on the petition, he did not give evidence of how he collected each signature or what steps were taken prior to the filing of the petition in support of the present application.

8. The union and the intervenor called no evidence. Following the applicant's evidence being adduced, the union made a non-suit motion and argued that the Board should dismiss the application on the grounds that the applicant had failed to prove its case.

9. It was uncontested that this application for decertification is the fourth such application filed by the employees of Maple Lodge Farms Ltd. in the past year and a half. While some of the applications have been withdrawn, the Board has issued one decision regarding a termination application. In the April 19, 1994, decision of a panel chaired by Vice-Chair M. Kaye Joachim, on Board File No. 3721-93-R [now reported at [1994] OLRB Rep. Apr. 447], the Board dealt with the voluntariness of a petition filed in connection with the application for termination of bargaining rights of the union. The Board outlined the onus which must be met by petitioners in order to establish the voluntariness of the petition. In Paragraph 13 of that decision the Board stated as follows:

13. There is an onus on the applicant to satisfy the Board, on a balance of probabilities, that the petition filed represents the voluntary wishes of its signatories. In order to satisfy the onus, the Board requires credible evidence regarding the origination, preparation and circulation of the petition. (*Hully Gully London Ltd.*, [1990] OLRB Rep. Feb. 160)). Although the Board has not laid down an exhaustive list of rules to apply in determining voluntariness, the Board has considered many factors; the following are relevant to this case:

- (a) The applicant is expected to call witnesses to give evidence, based on *personal* knowledge and observation, relating to the circumstances of the origination and preparation of the petition, and the manner in which *each* signature was obtained. Each and every signature on the petition must be identified and the circumstances under which it was obtained must be described. Where such evidence is not presented, the signature may, and likely will, be discounted. (*Custom Foam Specialities Limited*, [1986] OLRB Rep. Dec. 1680) (emphasis added)
- (b) The Board has declined to accept petitions as voluntary expressions of employee wishes where there are gaps in the evidence regarding ongoing custody of the petitions (*Hully Gully London Ltd.*, *supra*)
- (c) Where management employees or employees who are associated with management are involved in the circulation of the petition, the Board has declined to accept the petition as voluntary.

...In addition, the circulation of petitions must be free from the actual or perceived influence of management. Consequently, the Board will discount the signature of any employee who is, or is perceived to be, managerial. Similarly, where managerial person-

nel, or persons who are perceived as having a greater proximity to management than other employees, are involved in originating or circulating a petition, it is difficult to escape the conclusion that the employees would reasonably have perceived the petition to be supported by the employer and its reliability as a gauge of employee desires will be destroyed (*Custom Foam, supra*, at paragraph 11)

- (d) Although there is no rule against circulating a petition in the workplace, the Board may question the voluntariness of a petition circulated at the workplace. The Board has reasoned that employees would likely perceive that a petition circulated in the workplace is supported or condoned by management. (*Ontario Hospital Association Blue Cross*, [1980] OLRB Rep. Dec. 1759.)

10. The applicant has not provided the Board with detailed evidence of the origination of the petition and the only evidence before the Board is that Mr. Hussain prepared it. There is no evidence before us with respect to the circulation of the petition, the continuity of carriage of the petition from the time it went from Mr. Hussain to Mr. Rodgers, and then to the Board, and, there is no evidence of the circumstances in which each and every signature was collected by Mr. Rodgers. We are therefore not prepared to accept that the statement of desire filed by the applicant represents the voluntary wishes of the employees who are alleged to have signed the petition. On the basis of the evidence before us, the Board could not find that the required number of employees in the bargaining unit *voluntarily* signified in writing that they no longer wished to be represented by the responding party.

11. We note for the record that there was no evidence of employer involvement in this application for termination of bargaining rights.

12. It was for the foregoing reasons that we granted the union's motion to non-suit the applicant and dismissed this application on September 19, 1994.

13. By a letter dated September 28, 1994, Mr. Syed Hussain requested "a transcript of the complete hearing verbatim", and "a list of the Board's reasons" for our oral decision. This decision gives our reasons for the oral ruling rendered on September 19, 1994. The Board does not make a verbatim transcript of any of its hearings, so Mr. Hussain's request cannot be granted. Notes taken by the panel during hearings do not constitute a transcript or record of the proceedings and have no official status (see *Antoine A. Plennevaux*, [1994] OLRB Rep. May 593).

2125-94-R Sonya ter Stege, Applicant v. Ontario Public Service Employees Union (OPSEU), Responding Party v. Meaford Beaver Valley Community Support Services, Intervenor

Certification - Evidence - Petition - Practice and Procedure - Termination - Board ruling that employee who had been discharged contrary to the Act, prior to application to terminate union's bargaining rights, should be included on list of employees for purposes of the count - Board not giving any weight to petition sent to Board by fax - Applicant conceding that re-affirmation evidence filed by union representing voluntary expression of employee wishes - Application dismissed

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *O. R. McGuire* and *K. S. Davies*.

APPEARANCES: *Sonya ter Stege*, *Stacie Mirrlees* and *Kim Martin* for the applicant; *Chris G. Palliare*, *Ed Ogibowski*, *Terry Moore* and *Mary McCauley* on behalf of the Ontario Public Service Employees Union (OPSEU) the responding party; no one appeared on behalf of Meaford Beaver Valley Community Support Services.

DECISION OF THE BOARD; October 31, 1994

1. The name of the responding party is amended to read: "Ontario Public Service Employees Union (OPSEU)", and the style of cause is further amended to add "Meaford Beaver Valley Community Support Services" as an intervenor.
2. This is an application for termination of bargaining rights filed pursuant to section 58 of the *Labour Relations Act*.
3. The Ontario Public Service Employees Union was certified on September 17, 1993 to represent a bargaining unit of the intervenor's employees. This application was filed on September 19, 1994, a little over one year from the date of the certificate. The parties have agreed that the application is timely.
4. At the hearing on October 17, 1994, the parties requested the Board to decide two issues. The first is whether Judy Sullivan's name should be included on the list of employees for purposes of the count. The second issue is whether the Board should place any weight on a petition containing a single name that was faxed to the Board on the terminal date. The parties agreed on the facts giving rise to these issues and made concise submissions on each issue.
5. Judy Sullivan was discharged by the intervenor prior to September 1994. At a hearing of a section 91 application on October 4, 1994, the Board directed the intervenor to reinstate Judy Sullivan. The applicant argued that Judy Sullivan's name should not be on the list of employees since she was not working when the petition was circulated. The Board ruled orally at the hearing that Judy Sullivan's name should be included on the list of employees for purposes of the count. The Act provides in subsection 1(2) that no person shall be deemed to have ceased to be an employee by reason only of being dismissed contrary to the Act. Upon being discharged Judy Sullivan did not lose her status as an employee. This is not a context in which the Board applies the 30/30 rule. If the Board did not take this approach, employees and trade unions would be deprived of rights under the Act as a result of the illegal conduct of an employer.
6. The Board also ruled orally at the hearing on October 17, 1994 that it would not give any weight to the petition that was sent to the Board by fax. The applicant indicated that she called the Board and a man advised her that she could send the document by fax. The Board's Rules of

Procedure are quite clear however that the Board will not receive a petition document by fax. The application form used for this application advises persons to consult the Board's Rules of Procedure. As the Board has noted previously, persons who rely on information from someone at the Board in situations such as this do so at their own peril.

7. As a result of these determinations, the names on the petition filed in support of the application constitute 45.7% of those persons whose names appear on the list of employees for purposes of the count. The responding trade union filed evidence of re-affirmation and two of the persons who signed re-affirmations had previously signed the petition. If the re-affirmations were found to be a voluntary expression of employee wishes, it would reduce the applicant's support below forty-five per cent resulting in the dismissal of the application. Knowing these consequences, the applicant agreed that the evidence of re-affirmation filed by the responding party represented a voluntary expression of employee wishes. Accordingly, since less than forty-five per cent of the employees in the bargaining unit have signified in writing at the relevant time that they no longer wish to be represented by the trade union, the Board ruled orally at the hearing that this application is dismissed.

**1118-94-U International Brotherhood of Electrical Workers' Local 636, Applicant
v. Mississauga Hydro Electric Company, Responding Party**

Interference in Trade Unions - Intimidation and Coercion - Lock-Out - Strike - Strike Replacement Workers - Unfair Labour Practice - Board providing reasons for earlier bottom-line decision in respect of lock-out and violation of section 73.1 of the Act - Wearing of union T-shirts in workplace lawful activity protected by Act - Employer's refusal to allow employees wearing such T-shirts to work amounting to lock-out - Employer violating section 73.1 of the Act by using services of other employees in bargaining unit during lock-out - Board directing employer to cease and desist from using services of employees in bargaining unit so long as lock-out continuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Member *J. A. Ronson* and *C. McDonald*.

APPEARANCES: *Michael McFadden*, *Harold Vance* and *Rick Wacheski* for the applicant; *R. Budd*, *Ingrid Hann* and *Jo Ann Morello* for the responding party.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER C. MCDONALD; October 28, 1994

I

1. On July 6, 1994 [now reported at [1994] OLRB Rep. July 883], the Board issued the following decision in this matter:

...

2. Having considered the evidence and representations of the parties at the hearing on July 5, 1994, the majority of the Board (Board Member Ronson dissenting) is satisfied that, in the circumstances of this case, the wearing of white T-shirts bearing the red lettering "Solidarity Lives IBEW 636" in the workplace was lawful activity protected by the *Labour Relations Act*, which activity the responding employer sought to stop. The responding employer has refused, and con-

tinues to refuse, to allow employees wearing such T-shirts to work in an effort to induce or compel them to refrain from exercising their rights under the Act and has therefore locked out the employees, within the meaning of section 1(1) and section 73.1 of the *Labour Relations Act*.

3. The Board is therefore satisfied that the provisions of section 73.1 apply and, further, that the responding employer has breached section 73.1(4) of the Act by using the services of employees in the bargaining unit during the lock-out.

4. The Board therefore declares that:

(a) the employer has violated section 73.1(4) of the *Labour Relations Act* by using the services of employees in a bargaining unit that is locked-out;

(b) declares that the responding employer has violated sections 67 and 71 of the *Labour Relations Act*;

(c) orders the responding employer to cease and desist from continuing to use the services of employees in the bargaining unit that is locked-out for so long as the lock-out continues.

5. The Board reserves its decision with respect to the remaining issues. The Board's decision in that respect, and the Board's reasons herein will follow in writing.

The "cease and desist" order was not intended to and does not apply to the use of services of bargaining unit employees as permitted by sections 73.1 or 73.2 of the Act.

II

2. This is an application under section 91 of the *Labour Relations Act* in which the applicant trade union ("Local 636") alleged that the responding employer ("Mississauga Hydro") had violated sections 65, 67, 71 and 73.1 of the Act. In section 1 of the Act, "lock-out" and "strike" respectively are defined as follows:

"lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer's employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees; ("lock-out")

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output; ("grève")

Sections 3, 65, 67, 71, 73.1, and 91(4) and (5) provide that:

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71.1 No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

73.1- (1) In this section,

"employer" means the employer whose employees are locked out or are on strike and includes an employers' organization or person acting on behalf of either of them; ("employeur")

"person" includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; ("personne")

"place of operations in respect of which the strike or lock-out is taking place" includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. ("lieu d'exploitation à l'égard duquel la grève ou le lock-out a lieu")

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
2. The strike vote was conducted in accordance with subsections 74(4) to (6).
3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
2. The work of an employee in the bargaining unit that is on strike or is locked out.
3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

91.- (4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination,

without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or
- (d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.

(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

III

3. Local 636 and Mississauga Hydro have had a collective bargaining relationship for many years. Until a decision of this Board (differently constituted) dated June 11, 1993 (reported at [1993] OLRB Rep. June 523) directed that they be combined into one unit, the applicant represented two bargaining units of Mississauga Hydro employees; namely:

- (a) all employees of Mississauga Hydro, save and except supervisors, those above the rank of supervisors, caretaker, office staff and individuals employed on Government sponsored programs ("bargaining unit #1"); and
- (b) all office employees of Mississauga Hydro at Mississauga, save and except supervisors, all persons above the rank of supervisors, confidential secretaries, programmers, analyst, auditors, outside employees, persons employed for not more than 24 hours per week, students employed there during the school vacation period, students employed in the cooperative training program and individuals employed on Government sponsored programs ("bargaining unit #2").

4. The most recent collective agreement between the parties for bargaining unit #1 expired on March 31, 1994. The most recent collective agreement between them for bargaining unit #2 expired on October 31, 1993. After the Board directed that the two bargaining units be combined, the parties agreed to extend the collective agreement for bargaining unit #2 to March 31, 1994, thereby providing a common expiry date for collective bargaining purposes.

5. The parties began bargaining for a new collective agreement to cover the employees in

the combined bargaining unit. One of the parties (it is not clear which) applied for conciliation and, on March 24, 1994, the Minister issued a "No Board Report". Accordingly, pursuant to section 74 of the Act, the parties were in a strike/lock-out position fourteen days later.

6. By letter dated April 15, 1994, after it was in a legal strike position, Local 636 advised Mississauga Hydro that the bargaining unit employees had rejected a tentative agreement reached by the parties, which had been unanimously recommended by Local 636's bargaining committee. The applicant further advised Mississauga Hydro that the bargaining unit employees would be "working to rule", effective immediately; that is, that the bargaining unit employees would no longer work outside of their regularly scheduled hours.

7. In June, 1994, the parties resumed collective bargaining and the bargaining unit employees engaged in some "information picketing". On June 22, 1994, the bargaining unit employees rejected Mississauga Hydro's "final offer". Work to rule and information picketing continued.

8. Local 636 planned to hold a demonstration outside of Mississauga Hydro's offices on Mavis Street in Mississauga, on June 28, 1994, beginning at 4:00 p.m. For that purpose, it had white T-shirts made up bearing the red-lettered logo:

Solidarity
Lives
IBEW
636

These T-shirts were distributed to the bargaining unit employees.

9. Sandra Vetrano is a "project accounting clerk" with Mississauga Hydro. She has been the "Unit Chair" for "inside employees" (bargaining unit #2) for approximately one and one-half years. On June 28, 1994, she was scheduled to start work at 8:30 a.m. She arrived, wearing one of the Solidarity T-shirts, at approximately 8:20 a.m., punched in, turned on her computer and went to the washroom. When she returned, her supervisor, Craig Fleming, called her into his office. Ms. Vetrano testified that Mr. Fleming said "you know you and I have an understanding about this union thing" and told her to get a pile of the Solidarity T-shirts which someone had apparently placed there off her desk. Ms. Vetrano said she would and left to return to her desk.

10. Ms. Vetrano testified that as she was walking back to her desk she laughed at some joking she overheard at which point Mr. Fleming came out of his office and screamed "Do you think this is funny?". Ms. Vetrano explained that she was laughing at a joke another supervisor had made.

11. At approximately 9:20 a.m. Mr. Fleming approached Ms. Vetrano and told her that he had been instructed that any employee wearing one would have to remove the Solidarity T-shirt or "get out". Ms. Vetrano told Mr. Fleming she would not take off her T-shirt and he told her to get out, so she left.

12. Ms. Vetrano returned at 8:30 a.m. the next day, June 29, 1994. She was wearing her Solidarity T-shirt again. When she turned on her computer she found her voice-mail had been deactivated. At approximately 8:50 a.m., Mr. Fleming approached her and told her to take the T-shirt off or go home. Ms. Vetrano left.

13. On June 28, 1994, bargaining unit employees Lois Muise and Paul Sidhu were also told

to take off the Solidarity T-shirts they were wearing or go home. Both refused to remove their T-shirts and left.

14. John Stewart is a member of the applicant's executive and the "Unit Chair" of the "outside unit" (bargaining unit #1). On June 29, 1994, he was one of many bargaining unit employees who came to work wearing a Solidarity T-shirt. Also like the other employees, he was told to take the T-shirt off or go home. Like the other employees, he chose to leave.

15. Mississauga Hydro's sole witness was Ingrid Hann. Ms. Hann is Mississauga Hydro's Director of Employee and Customer Relations and is the person who has led the management bargaining team. She testified that Mississauga Hydro has a clothing policy or dress code which bargaining unit employees who wore the Solidarity T-shirts at work during business hours had violated. She said that when Ms. Vetrano, Ms. Muise and Mr. Sidhu refused to remove their T-shirts on June 28, 1994, they were "dismissed" for the remainder of the day. Their respective supervisors wrote a "memo to file", which it appears was not provided to either the person concerned or the applicant at the time, as follows:

June 28, 1994

MEMO TO FILE

Re: Lynn Vetrano - Suspension

June 28, 1994

On Tuesday, June 28, 1994 at 9:20 a.m. I, in accordance with a company wide directive, advised the associates within the Project Accounting Department to desist from wearing white T-shirts displaying a union slogan within the confines of the building during work hours. The consequences of non-compliance were made clear to the group.

Lynn Vetrano subsequently refused to comply and was promptly dismissed for the day. This act of insubordination will carry a one-day suspension without pay.

"Craig Fleming"

Craig Fleming
Manager, Project Accounting

CF:ay

c.c.

K.N. Wahl
R. Herman
I. Hann
H. Vance

June 28, 1994

MEMO TO FILE

Re: Lois Muise - Suspension

June 28, 1994

On Tuesday, June 28, 1994 at approximately 10:20 a.m. in accordance with a company wide directive, I advised Lois Muise of the Meter Reading Department to desist from wearing a white T-shirt displaying a union slogan within the confines of the building during work hours. The con-

sequences of non-compliance were made clear.

Lois Muise subsequently refused to comply and was promptly dismissed for the day. This act of insubordination will carry a one-day suspension without pay.

"Frank Crawford"

Frank Crawford
Meter Reading supervisor

FC:ay

c.c.

K.N. Wahl
I. Hann
H. Vance

June 28, 1994

MEMO TO FILE

Re: Paul Sidhu - Suspension

June 28, 1994

On Tuesday, June 28, 1994 at approximately 3:00 p.m. in accordance with a company wide directive, I advised Paul Sidhu of system Planning Department to desist from wearing a white T-shirt displaying a union slogan within the confines of the building during work hours. The consequences of non-compliance were made clear.

Paul Sidhu subsequently refused to comply and was promptly dismissed for the remainder of the day. This act of insubordination will carry a 1 1/2 hours suspension without pay.

"Raymond Rauber"

Raymond Rauber
Project Manager

RR:ay

c.c.

K.N. Wahl
R. Jones
I. Hann
H. Vance

The Board was also presented with another letter dated June 29, 1994 addressed to "Associate" as follows:

June 29, 1994

Associate,

On Tuesday, June 28, 1994 both the workplace and I.B.E.W. officials were advised that wearing I.B.E.W. T-shirts on site was unacceptable and would not be condoned.

As you elected on Wednesday, June 29, 1994 to disregard Management's directive to refrain from wearing attire inappropriate to our business a one day unpaid suspension has resulted effective today's date.

Any future actions of this or a similar nature on your part will result in more severe disciplinary action being taken.

Yours truly,

Director

c.c. I. Hann
J. Morello
L. Vetrano
J. McNeil

It is not apparent how, when, or to whom this document was delivered.

16. Similarly, all employees who wore Solidarity T-shirts to work on June 29, 1994 were suspended for the day.

17. All bargaining unit employees were told that they would not be allowed to return to work wearing their Solidarity T-shirts.

18. Ms. Hann testified that (as of the date of the hearing) any bargaining unit employee was free to return to work at any time, so long as s/he does not wear a Solidarity T-shirt at work. She said that the bargaining unit employees had been sent home as a disciplinary response to their breach of Mississauga Hydro's clothing policy, and that Mississauga Hydro did not intend to lock them out. Indeed, Mississauga Hydro specifically responded to a suggestion that this was a lock-out, in a letter to the union dated June 29, 1994, that "such action as a disciplinary measure and does not constitute a lock-out." Then, by letter dated June 30, 1994, Mississauga Hydro wrote to the union that, among other things:

"You are clearly advised that there was no LOCK-OUT and from your members' picketing we must assume you are in a legal strike position."

In another letter dated June 30, 1994 Mississauga Hydro wrote as follows:

"This letter will confirm our telephone conversation of June 29/94 at approximately 3:00 p.m.

I emphasized my concern over the picketers restricting access on and off our property and having caused damage to company property.

You were clearly advised that there was no LOCK-OUT and from your members' picketing we must assume you are in a legal strike position.

We reviewed my letter to you of June 28/94 which was written in compliance with Section 73.2 (3) (a) of the Labour Relations Act. The replacement workers that we reference are regular lineman crews and/or are the contractors whom we have been employing for some time. As a result your reference to Bill 40 is not applicable.

Rick, again we must emphasize the importance of the picketing to cease. I've given you some suggestions in order to restore order and labour peace at Hydro Mississauga."

19. The evidence before the Board with respect to Mississauga Hydro's clothing policy or

dress code includes the following two memos:

BULLETIN BOARD NOTICE/NO. 29

Re: OFFICE SUMMER DRESS CODE

Date of Notice: July 21, 1993

Date of Removal: September 1, 1993

IN THE INTEREST OF COMFORT, BUT YET MAINTAINING A PROFESSIONAL IMAGE, WE WILL BE OBSERVING THE FOLLOWING CASUAL SUMMER DRESS CODE DURING JULY & AUGUST FOR ALL EMPLOYEES SITUATED AT THE OFFICES OF 3240 MAVIS ROAD. SUITABLE ATTIRE SHOULD STILL PROJECT A PROFESSIONAL IMAGE AND NOT INCLUDE:

BLUE JEANS
UNCOLLARED SHIRTS (WITH WRITING OR ADVERTISING)
SHORTS (OTHER THAN WALKING SHORTS)
HALTER TOPS
CAPS & HATS
OPEN SANDALS (SUCH AS FLIP FLOPS OR BIRKENSTOCKS)

CASUAL ATTIRE SHOULD BE SUBTLE IN COLOUR, AND NOT BE OF FLUORESCENT TONES.

WHEN BUSINESS MEETINGS ARE BEING CONDUCTED WITH EXTERNAL REPRESENTATIVES, APPROPRIATE BUSINESS ATTIRE IS REQUIRED.

EFFECTIVE SEPTEMBER, WE WILL REVERT TO OUR USUAL BUSINESS ATTIRE.

"Karl Wahl"

KARL WAHL
GENERAL MANAGER

KW:WC

MEMORANDUM TO: System Control Centre
Operators and Students

DATE: December 4, 1992

COPY: Karl Wahl J.P. Michaud
Ingrid Hann/ Jim McNeil
Gunars Ceksters

FROM: Mike Angemeer

RE: PROFESSIONAL ATTIRE -
SYSTEM CONTROL CENTRE

Our System Control Centre has become the envy of the industry. Your efforts to promote a professional image thus far are appreciated.

In order to maintain this professional image, the following minimum requirements have been agreed upon by management and the union.

During normal office hours, the following must be observed:

./No jeans
./No running shoes
./No t-shirts or sweatshirts

Appropriate clothing including shirts and ties should be worn for special tours with advance notification.

With your help we will continue to show that we are the best in the industry.

Thanks,

“Mike”

Mike Angemeer
Operations Manager

20. In addition, Ms. Hann testified that three employees received “verbal reprimands” for not complying with this clothing policy. These included a customer service clerk who wore a see-through blouse with no undergarments, a cash clerk who wore a Corona beer T-shirt, and another employee who wore a dress or sweat-shirt considered to be inappropriate. There was no evidence that this verbal discipline had been brought to anyone else’s attention. On the other hand, Local 636’s witnesses testified that they have often seen bargaining unit employees at work wearing T-shirts or sweat-shirts with or without various logos. Ms. Vetrano said she herself has commonly worn a T-shirt to work and has observed employees at work in uncollared shirts and other informal clothing. She said she had never been disciplined or spoken to about this prior to June 28, 1994, and, in her capacity as Unit Chair, was unaware of any other employees being spoken to or disciplined for wearing such clothing. Mr. Stewart testified that the December 4th, 1992 memo, above, was routinely ignored by employees, including himself. He said it was common for employees to wear T-shirts, he also said that he and other employees have routinely worn caps or shirts bearing an IBEW logo. He said he had never previously been disciplined for this, and was not aware that any other employee had been either.

21. Ms. Hann conceded that the Solidarity T-shirts would not have created a hazard or impeded any employee’s physical ability to perform his/her work. However, she said, first that “it would be inappropriate to advertise the IBEW slogan to the public or Business Representatives”, and, second, that the problem was not with the union logo but with the message the Solidarity T-shirt sent, which was not one Mississauga Hydro wish to promote.

IV

22. Local 636 argued that Mississauga Hydro’s action was intended to send a message to bargaining unit employees that they would have to pay a price for supporting their trade union, and that it was intended to stop the employees from exercising their right to do so. Local 636 submitted that the Board should therefore conclude that Mississauga Hydro’s actions constituted a lock-out. Local 636 further argued that Mississauga Hydro’s action was contrary to the unfair labour practice provisions of the Act. It submitted that there was nothing about the Solidarity T-shirts which was illegal or even contrary to the employer’s practised clothing policy, and that Mississauga Hydro’s response to the Solidarity T-shirts was motivated by its desire to stop the employees from expressing their support for Local 636. Local 636 conceded that employees are not entitled to wear whatever they want and that employees who are required to wear uniforms (like meter readers for example) could not wear T-shirts over their uniforms. Finally, Local 636 argued that the Board should not defer to arbitration. In argument, Local 636 referred the Board to *Rondar Services Limited*, [1977] OLRB Rep. Oct. 655, *Rosco Metal Products Ltd.*, 64 CLLC paragraph 16,303 page 1250, *Canadian Controllers Limited*, [1966] OLRB May 130, *Canadian Imperial Bank*

of Commerce, North Hills and Victoria Hills Branches, Kamloops, B.C., 80 CLLC paragraph 16,001 page 339, *Independent Canadian Transit Union*, 7 CLRBR (NSN) 137, *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254 and *Ford Glass Limited*, [1986] OLRB Rep. May 624.

23. Mississauga Hydro argued that it is entitled to put restrictions on what its employees can wear and to require that its employees present a professional image. Counsel argued that by wearing the Solidarity T-shirts to work, the employees were bringing their demonstration into the workplace and that they were not entitled to do so because it was provocative and disruptive to the workplace, and because they were no longer demonstrating on their own time. Counsel asserted that Mississauga Hydro's response was disciplinary and that there was no evidence of any intent to lock-out the employees or to strike out at the union in an unfair labour practice manner. Counsel argued that this dispute was something to which the "obey now grieve later" rule applied and that the real dispute was whether Mississauga Hydro had just cause to impose the discipline it did, which is something properly dealt with at arbitration. Counsel said that it was the union which had engaged in a strike. Counsel said that there was nothing to indicate a violation of the Act and that the employer had every right to protect its public image and maintain order in the workplace. In argument, Mississauga Hydro referred to *The Perley Hospital*, [1981] OLRB Rep. June 769, *The Corporation of the City of Toronto*, [1986] OLRB Rep. Dec. 1834, *Re BC Telephone and Telecommunications Workers Union*, (1982) 8 LAC 3(d) 271 (B. Williams), *Re Dominion Stores Ltd. and Department Store Union*, (1985) 19 LAC 3(d) 269 (J.D. Oshay), *Ralph Milrod Metal Products Limited*, [1977] OLRB Rep. Feb. 79 and *Re Pacific Western Airlines and Airlines Employees*, 1981 29 LAC 2(d) 1 (Christie).

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24. We were satisfied that the Board should deal with the dispute between the parties herein and not defer to arbitration. The real dispute between the parties was not a contractual one. Indeed, there was no collective agreement in effect between them. The dispute raised issues which are central to the collective bargaining process, and raised serious questions with respect to the interpretation and application of provisions which are central to the scheme of the *Labour Relations Act*. In our view, it could not be said that the dispute between the parties was essentially contractual in nature, or that an arbitration, if one was held, would resolve it (*Valdi Inc.*, *supra*, *Sunworthy Wall Coverings* [1986] OLRB Rep. Jan. 164, *Ford Glass Limited*, *supra*, *The General Hospital of Port Arthur*, [1986] OLRB Rep. Sept. 1218).

25. The *Labour Relations Act* specifically provides, in section 3, that every person is free to join a trade union of his/her choice and is entitled to participate in its lawful activities. The Act specifically prohibits an employer (or a person acting on its behalf) from interfering with the representation of employees by a trade union, or with the exercising of any rights under the Act (sections 65, 67 and 71). Section 3 is limited by section 72, which provides that:

72. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade the employee during the employee's working hours to become or refrain from becoming or continuing to be a member of a trade union.

Section 72 does not absolutely prohibit the solicitation of support for or opposition to a trade union at the workplace or during working hours. It does not prohibit propaganda for or against a trade union, or demonstrations of support for or opposition to a trade union. Section 72 does not authorize an employer to interfere with trade union activity. All section 72 does indicate that the right to exercise rights under the Act, including participating in the lawful activities of a trade union, is not an absolute one. Consequently, an employer is not prohibited from disciplining employees or otherwise running its business. However, an employer is not entitled to impose discipline or eco-

conomic sanctions in order to induce employees to refrain from exercising their rights under the Act (*Rondar Services Limited, supra*).

26. As the jurisprudence demonstrates, it is now well accepted that wearing pins, buttons or clothing which expresses support for a trade union, or for a bargaining position in negotiations, is collective bargaining activity which is protected by the *Labour Relations Act*, so long as it is not offensive and does not unduly interfere with the operations or legitimate interests of the employer (see, for example, *Air Canada and Canadian Airline Employees Association*, (1985) 19 LAC 3(d) 23 (Brent) *Quan v. Treasury Board*, (1990) 90 CLLC paragraph 12,039 (Federal Court of Appeal), *Metroland Printing, Publishing and Distributing*, Board File No. 0823-92-U, June 15, 1994, unreported (to be reported in the OLRB Rep. for June) [now reported at [1994] OLRB Rep. June 738] *Rosco Metal, supra*, *Canadian Imperial Bank of Commerce, supra*). To put it another way, an employer is prohibited from interfering with trade union activity unless it interferes with the employer's control or direction of its employees or business. An employer is entitled to make clothing rules or implement a dress code. However, as both the arbitral and Board jurisprudence demonstrates, such rules must be reasonable and based on legitimate and cogent business concerns that employees dress or appearance will affect their work performance or the employer's business. An employer does not have an absolute right to create employees in its own image by imposing its views of appearance or dress on them (*Canadian controllers Ltd., supra*; Borough of Scarborough (1972) 24 LAC 78(Shime); *Air Canada and CALFA* (1975) 9 LAC (2d) 254 (Deverell); *Ralph Milrod Metal Products, supra*; *Air Canada and CALEA* (1980) 27 LAC (2d) 289 (Simmons); *B.C. Telephone and Communications Workers Union, supra*; the *Dominion Stores, supra* cited by Mississauga Hydro is distinguishable in that the buttons in that case had nothing to do with the employment relationship in question). Consequently, where the trade union activity consists of employees displaying support for their bargaining agent on their persons or clothing, an employer cannot interfere unless it is demonstrably disruptive or interferes with the employee's safety or ability to work, or with the employer's business. Expressing support for a bargaining agent on one's clothing is not necessarily incompatible with an orderly or professional workplace.

27. Further, we are unable to see what is necessarily wrong with employees declaring their support for their trade union in the workplace, particularly in the context of ongoing collective bargaining between the trade union and the employer. Collective bargaining is not a tea party. Often it is a test of wills. In the context of the collective bargaining process, it is unrealistic to suggest that such expressions of support can or should be kept out of the workplace. Collective bargaining disputes are about the workplace and inevitably permeate the workplace to some degree.

28. In this case, it is clear that the purpose of the Solidarity T-shirts was to express support for Local 636 and to increase solidarity among the bargaining unit employees. Although somewhat provocative, the T-shirts are not offensive, do not malign Mississauga Hydro, and were not intended to cause disruption or interfere with Mississauga Hydro's operation. Mississauga Hydro conceded that the T-shirts did not create any kind of hazard and would not have impaired any employee's physical ability to do his/her work. The evidence does not suggest that this expression of support for Local 636 caused any violence or other disturbance, interfered with the quality or quantity of work done by employees, interfered with anyone's rights, created any safety problems, affected Mississauga Hydro's relations with customers or suppliers, or undermined public confidence in the utility. It is also apparent from the evidence that the existence and nature of the collective bargaining dispute between the parties was no secret.

29. Indeed, it was neither the T-shirts themselves nor the reference to "IBEW Local 636" which Mississauga Hydro objected to. It is apparent from Ms. Hann's testimony that it was the

message sent by the words "Solidarity Lives"; that is, the expression of support for Local 636 which Mississauga Hydro did not like and which it intended to stop.

30. Further, on the evidence, Mississauga Hydro's purported clothing policy or dress code has been more honoured in the breach than the observance.

31. In any case, it is apparent that Mississauga Hydro's intention was to stop bargaining unit employees from expressing support for their trade union in the workplace and that it resurrected its moribund dress code to accomplish that end.

32. In the circumstances of this case, we were satisfied that the bargaining unit employees who wore Solidarity T-shirts were exercising their right to support their trade union. We were further satisfied that Mississauga Hydro refused to allow such employees to continue to work with a view to compel or induce them to refrain from exercising that right, which is a right protected by the *Labour Relations Act*. That constitutes a "lock-out" within the meaning of the Act.

33. The bargaining unit employees refused to accept their employer's ultimatum, and they did picket Mississauga Hydro when they were locked-out. However, the employees were not refusing to work or otherwise acting in concert to restrict or limit their employer's output. They were prevented from working by their employer. That is, they were locked-out, not on strike.

34. Section 73.1(3) of the Act provides that for purposes of sections 73.1 and 73.2 a bargaining unit is considered locked-out if any of the employees in it are locked-out. Section 73.1(4) prohibits an employer from using the services of any employee in a bargaining unit that is locked out. Accordingly, as soon as the first bargaining unit employee who wore a Solidarity T-shirt was disciplined and thereby locked-out, which appears to have been Ms. Vetrano, the whole bargaining unit was locked-out, and Mississauga Hydro was prohibited from using the services of any bargaining unit employee. It did so for at least June 28, and part of June 29, 1994, contrary to section 73.1.

35. In addition, in disciplining bargaining unit employees for exercising rights under the *Labour Relations Act*, Mississauga Hydro breached sections 67 and 71 of the Act.

36. For these reasons, the Board made the declarations and orders in its July 6, 1994 decision as aforesaid.

37. Because of the Board's conclusions as aforesaid, and also because the parties did not really address the issue in argument, we find it unnecessary to deal with Local 636's pleaded assertion that Mississauga Hydro's conduct also violated section 65 of the Act.

38. The Board continues to remain seized with respect to the issues of damages. If the parties are unable to resolve that issue between them, they may request a hearing before the Board.

39. Board Member Ronson's dissent will follow.

4471-93-U Ontario Public Service Employees Union, Applicant v. Modern Building Cleaning Inc., Centennial Centre of Science and Technology (the "Ontario Science Centre") and the individuals listed at Schedule "A", Responding Parties

Strike - Strike Replacement Workers - Union complaining about building owner's management staff doing clean-up work during strike of cleaning contractor's employees - Board concluding that building owner acting on its own behalf, not "acting on behalf of" cleaning contractor employer - Union also alleging that introduction of new machinery after commencement of strike violating Act - Application alleging violation of section 73.1 of the Act dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *F. B. Reaume* and *K. Davies*.

APPEARANCES: *Craig Flood*, *Ted Loughead* and *Maurice Anderson* for the applicant; *James G. Knight*, *John McMaster* and *Oliver Zeidler* for Modern Building Cleaning Inc.; *C. G. Riggs*, *Deborah Powell*, *Peter Birnbaum*, *Janet Geisberger* and *John O'Reilly* for Centennial Centre of Science and Technology.

DECISION OF THE BOARD; October 7, 1994

1. The name of the responding party is hereby amended to read: "Centennial Centre of Science and Technology". This responding party is commonly referred to as the Ontario Science Centre, and we will refer to it by this name.

Background

2. This is an application filed under section 91 of the *Labour Relations Act* by OPSEU, alleging that Modern Building Cleaning Inc. ("Modern") and the Ontario Science Centre, have breached sections 73, 73.1, and 91(7) of the Act. At the request of the applicant, it was scheduled on an expedited basis.

3. On the first day of hearing, the responding parties made preliminary objections, asserting that the application ought to be dismissed as it was untimely, or as failing to disclose a *prima facie*, or arguable, case. The Board reserved its decision, and issued a short written decision the following day. We now provide our reasons for that decision.

4. The events in question relate to a lawful strike by the employees of Modern who work at the Ontario Science Centre. In response to that strike, both Modern and the Ontario Science Centre engaged in certain actions alleged here by OPSEU to constitute breaches of the Act.

5. OPSEU represents all employees of Modern who are engaged in cleaning services at the Ontario Science Centre, save and except managerial exceptions and office, clerical and sales staff.

6. The facts as follow were those pleaded by the union in support of its application.

7. On March 2, 1994, the union staff representative wrote to Modern advising that the bargaining unit would be commencing a strike as of March 10, 1994. On the same date, the union wrote to the Ontario Science Centre, advising it that the Ontario Science Centre staff could not legally perform any of the work performed by bargaining unit members during the upcoming strike.

8. On March 3, 1994, the applicant filed an application with this Board (not the instant

application) alleging a breach by Modern of section 73.2(12) of the Act. The parties settled that dispute in a Memorandum of Settlement dated March 8, 1994. One of the terms of that settlement was an agreement that the employer, Modern, could utilize the services of up to three on-site managerial persons, but only those persons, to perform bargaining unit work at the Ontario Science Centre in respect of which the strike was shortly to take place.

9. As scheduled, the strike commenced on March 10, 1994. Also on that date, a meeting of management staff of the Ontario Science Centre was held. The agenda of that meeting dealt with how the Ontario Science Centre ought to respond to the strike. All those attending were advised to commence picking up the garbage, which task was bargaining unit work. After that meeting, the managerial staff of the Ontario Science Centre did in fact begin picking up papers, pop cans and other garbage around the facility, a practice without precedent.

10. On March 28, 1994, the instant application was filed, alleging the facts as recited above, and asserting that both Modern and the Ontario Science Centre had breached the Act through the actions of the staff of the Ontario Science Centre.

11. On March 30, 1994, OPSEU filed further particulars, amending its application as follows:

19. On March 26, 1994, Mr. Dan Somera, ("Somera Sr.") an on site managerial employee of Modern Building Cleaning Inc. ("Modern") was at the Ontario Science Centre with his son, Joseph Somera, ("Somera Jr.") a part-time cleaner and member of the bargaining unit of the Applicant which is on legal strike. Somera Jr. was performing bargaining unit work, namely, picking up and taking out garbage on March 26, 1994. Somera Jr. has performed bargaining unit work from and after March 10, 1994 on various occasions, during the midnight shift. (see Schedule "C", Tab 12).
20. As indicated in paragraph 13 above, a previous Application pursuant to s. 73.2(12) of the Act was filed on March 3, 1994 [OLRB File No. 4137-93-M] and was resolved pursuant to a Memorandum of Settlement dated March 8, 1994. That Memorandum of Settlement provided at paragraph 2 thereof:

"the Applicant agrees, without prejudice, that the responding party may request any and all of the following on site managerial persons, and those persons only, to perform bargaining unit work at the Ontario Science Centre in respect of which the strike or lock out is taking place, in the event that strike or lock out does take place:

- (a) Joe De Melo
- (b) Luis Travera
- (c) Dan Somera"

Somera Sr. has violated the terms of that Memorandum of Settlement by having his son perform bargaining unit work at the Ontario Science Centre. Somera Jr.'s actions constitute a violation of that Memorandum of Settlement, which is deemed to be a violation of the Act, as well as a violation of Section 73.1 of the Act. (See Schedule "C", Tab 13).

21. From and after March 10, 1994 the first day of the strike, Modern has introduced and utilized the following industrial machinery to perform work of the bargaining unit:

- (i) Starr Hydrodyne 33
 - washes and scrubs floors in one motion
 - cleans a 4-foot swath in one pass
- (ii) Hako Minutemann
 - vacuums carpets
 - vacuums a 3.5 foot swath in one pass
- (iii) Tennant Trend
 - sweeps and vacuums floors at the same time

Each machine does the equivalent of the work of two persons in the bargaining unit and are therefore prohibited by the provisions of s. 73.1 of the Act.

12. In the same letter, the applicant indicated that it was alleging breaches of sections 73, 73.1 and 91(7) of the Act with respect to the allegations set out in these additional particulars.

13. Modern and the Ontario Science Centre filed responses, and raised several preliminary objections. First, they alleged that the application was untimely. The applicant sought an expedited hearing relying on urgency, but the application had not been filed until approximately two weeks after the events complained of had occurred. The Board ought not to allow the union to utilize the expedited proceedings in such circumstances. Second, the attempt by the applicant to file further particulars on March 30, 1994 was untimely, and ought not to be allowed. In a proceeding as expedited as a "no replacement worker" application, responding parties have only an extremely short time period in which to respond. It is unfair, they assert, to let an applicant add new particulars after the application has been filed, when as here, the events added arose before the original application was filed.

14. Third, the responding parties asserted that the application as filed (including the further particulars) failed to disclose a *prima facie* or arguable case for a breach of the Act, or for the remedial relief sought. The application ought therefore to be dismissed without a hearing.

15. The Board heard the submissions of the parties with respect to these preliminary matters. Because of the nature of the objections, the Board accepted as true and provable the facts as pleaded by OPSEU and as set out above, but only for purposes of dealing with the preliminary issues. Many of the facts as pleaded by OPSEU were not in fact agreed to by Modern and the Ontario Science Centre.

Timeliness

16. We turn first to the timeliness objections, that the entire application ought to be dismissed as being filed too late, or alternatively, that the new particulars, filed two days after the application was filed, ought not to be accepted by the Board.

17. The responding parties noted the requirements of the Board's Rules, particularly Rules 16 and 17, and the request of the union that this application be heard in an expedited fashion. Pursuant to the Rules, the responding parties had only two days from the time at which the request for expedition was delivered to them to file their responses. The responding parties note that their responses must be comprehensive, containing statements of all material facts upon which the responding parties intend to rely in the proceeding.

18. Given the ability of the applicant to dictate the timing of the application, and the onerous response requirements, the responding parties argued that a delay of approximately two weeks between the events complained of and the filing of the application ought to lead the Board to

decline to consider the merits, at least on an expedited basis. They submitted that no good reason had been provided for the two week delay.

19. Alternatively, the responding parties argued that the further particulars filed on March 30, 1994, ought not to be allowed by the Board. A number of the matters complained of in those particulars arose prior to the filing of the initial application, and the applicant had provided no reason for its delay in filing these further particulars. To allow the application to be so expanded would unfairly prejudice the ability of the responding parties to prepare and participate in the proceeding.

20. The Rules dealing with pleadings are designed to ensure that parties provide sufficient information in advance of the hearing, in a timely and sufficiently comprehensive way, so that the parties and the Board are made reasonably aware of the issues and material facts before the hearing begins. Parties can then come to the hearing equipped with a reasonable understanding of the matters in agreement, those in dispute, and those that need resolution by Board intervention. There is little to commend "trial by ambush", nor is there any place for parties who seek to delay the expeditious resolution of the labour relations dispute before the Board. The practical realities are such that responding parties may often wish to delay a Board proceeding. Delay itself can be a strategic tool utilized by a party to increase its leverage. The Rules can and do seek to minimize the degree to which such delay in Board proceedings will itself become a factor in the labour relations dispute.

21. To enhance the expeditious resolution of the dispute, the Rules do require significant efforts of all parties, but particularly of responding parties and their counsel. The Board does expect compliance with its Rules, and parties who fail to do so bear the risks of such failure. At the same time, there will be circumstances in which with reasonable excuse, parties have been unable to comply with the pleading requirements in the Rules. The nature of the proceeding, the complexity of the issues, the number of witnesses, the unavailability of particular individuals, the continuing development of the issues, the occurrence of new facts; these factors and others can mean that parties, applicants or responding parties, have been unable to fully plead all material facts as required by the Rules.

22. The Rules themselves provide for this possibility (e.g. Rules 22 and 27), that circumstances may lead the Board to relieve a party from the requirements in the Rules. Our paramount concern is to ensure that Board proceedings move expeditiously and efficiently and that all parties have a fair and reasonable opportunity to participate in the proceedings. The Rules are a means to this end, not a goal.

23. The Board deals with labour relations disputes that arise in the Province, and tries to do so in a manner that attempts, as best we can, to promote sound labour relations. The parties who appear before us usually have, or may be about to begin, an ongoing relationship, one characterized by continuing and regular interaction, and often by a large number of potential points of friction. A Board process perceived to be unfair will not likely promote a harmonious relationship. It is important that parties feel they have had a reasonable opportunity to "make their case". Otherwise, our decisions are merely imposed, and do not contain the instructive content that neutral and expert third party intervention can provide.

24. Here, the responding parties object because the applicant waited approximately two weeks after the events to file the complaint, and it then asked that it be expedited, with the consequential demands upon the responding parties to file their materials within two days. This is unfair, they assert.

25. There are many reasons during the early stages of a strike why parties may delay in filing complaints before the Board. During this time, parties will be assessing their relative positions, and in many cases, continuing to negotiate. The approach taken by the Board, in deciding whether to schedule and hear a subsequent complaint on an expedited basis, should take account of this reality. The message would be clear if we were to dismiss the instant application on the basis of timeliness: parties who seek to resolve matters themselves, without Board intervention, may later be penalized when they seek to file complaints with this Board.

26. This is not a desirable message. There will no doubt be cases where the length of the delay is such that the Board will not treat the application in an expedited manner. And there will be cases where the delay has caused prejudice to the responding parties. But neither is true here. A delay of two weeks does not begin to approach the point at which we would conclude that it was inappropriate to allow an application complaining about replacement workers to proceed on an expedited basis. Accordingly, we decline to dismiss the application because OPSEU waited two weeks from the events complained of in order to file the instant complaint.

27. We reach a similar conclusion with respect to the further particulars filed two days after the application was filed. The additional particulars relate directly to the thrust of the complaint, and are alleged to be breaches of various sections of the *Labour Relations Act*. There is no apparent (or asserted) prejudice to the responding parties, as the hearing took place approximately one week after receipt of the additional particulars. Even if there had been some prejudice, it could have been cured by a short adjournment. The fact that this is an expedited proceeding is not itself sufficient reason to preclude an applicant from filing additional material.

Whether a Prima Facie Case Exists

28. We turn now to consider the objection that the complaint as filed, including the additional particulars, fails to disclose a *prima facie* or arguable case with respect to the allegations that Modern Building Cleaning and the Ontario Science Centre breached section 73, 73.1, and 91(7) of the Act.

29. Those sections read as follows:

73.- (1) No person, employer, employers' organization or person acting on behalf of an employer or employers' organization shall engage in strike-related misconduct or retain the services of a professional strike breaker and no person shall act as a professional strike breaker.

(2) For the purposes of subsection (1),

"professional strike breaker" means a person who is not involved in a dispute whose primary object, in the Board's opinion, is to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under this Act in anticipation of, or during, a lawful strike or lock-out; ("briseur de grève professionnel")

"strike-related misconduct" means a course of conduct of incitement, intimidation, coercion, undue influence, provocation, infiltration, surveillance or any other like course of conduct intended to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under this Act in anticipation of, or during, a lawful strike or lock-out. ("inconduite liée a une grève")

(3) Nothing in this section shall be deemed to restrict or limit any right or prohibition contained in any other provision of this Act.

73.1- (1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them; (“employeur”)

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; (“personne”)

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. (“lieu d’exploitation à l’égard duquel la grève ou le lock-out a lieu”)

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.
- 3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

- 1. An employee or other person, whether paid or not, who ordinarily works at another of the employer’s places of operations, other than a person who exercises managerial functions.
- 2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.

3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

91.- (7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

30. Different breaches are alleged against the responding parties. We first consider whether there is a *prima facie*, or arguable, case pleaded with respect to the alleged breach by the Ontario Science Centre. After hearing the submissions of the applicant, it became apparent that the only section alleged to have been breached by the Ontario Science Centre was section 73.1 of the Act. The applicant acknowledged that the Board would have to conclude that the Ontario Science Centre was acting "on behalf of" Modern in order to find that the Ontario Science Centre had breached section 73.1. We turn to this issue.

31. Section 73.1 describes a complicated code of permissible and impermissible behaviour for employers and employees during strikes or lockouts. Replacement workers are proscribed in certain circumstances and allowed in others. The general approach taken by section 73.1 is to prohibit the "employer" from utilizing certain classes of persons to perform certain work during a strike or lockout. The prohibitions restrict the actions of "employers". "Employer" however, is defined in section 73.1(1) to include a "person acting on behalf of" the employer. It is common ground that Modern is the employer here. The issue is whether the Ontario Science Centre was "acting on behalf of" Modern Building Cleaning.

32. Pursuant to a commercial arrangement, the Ontario Science Centre hired Modern Building Cleaning to provide specified cleaning services for its facility. The employees of Modern at the Ontario Science Centre performed a variety of cleaning duties, including the cleaning and waxing of floors, the picking up and taking out of garbage, the cleaning of washrooms and cafeteria, and the general cleaning of all areas at the Ontario Science Centre.

33. When Modern Building Cleaning was prohibited by the *Labour Relations Act* from having its striking employees (amongst others) perform these services, the Ontario Science Centre held a meeting of its management personnel on March 10, 1994, and arranged for them to pick up garbage around the site. There is no allegation that the Ontario Science Centre advised Modern of this meeting, that Modern was in any way involved in this decision by the Ontario Science Centre, nor that Modern was even aware of this meeting or its result. There is no allegation of any communication or contact after this meeting between Modern and the Ontario Science Centre over the issue of the Science Centre using its own management personnel to pick up garbage. Thus, the applicant does not suggest that there was any interaction between Modern and the Ontario Science Centre over the issue of who would pick up garbage, or perform any of the struck work, nor does it suggest that Modern was in any way involved directly or indirectly in such a decision.

34. In these circumstances, we conclude that the Ontario Science Centre was not “acting on behalf of” Modern when its managerial personnel picked up garbage around the Centre. As owner of the facility, the Ontario Science Centre was concerned for its cleanliness and appearance. When the company hired to perform cleaning services was unable to do so, the Ontario Science Centre performed some of these services itself, with its own personnel. This fact alone, and that is all there is here, does not arguably establish that the Ontario Science Centre was acting on behalf of the company it had hired to clean the facilities.

35. There may be circumstances in which the Board might logically infer that a company or entity was acting on behalf of the actual employer. A lack of any allegation of communication, contact or interaction between the two companies would not then be fatal. Here, however, the logical inference is that the Ontario Science Centre personnel were picking up garbage for the benefit of, or on behalf of, the Centre itself, and not to assist Modern in any way.

36. The union argued that the commercial contract between the Ontario Science Centre and Modern could be terminated by the Ontario Science Centre if the Centre was not cleaned properly. Thus, submitted the union, the work being done by the Ontario Science Centre personnel was clearly to the benefit of Modern, because it had the effect of reducing the likelihood of termination of the contract. The union also relied upon the provisions of section 73.1(9), which place upon the employer the burden of proof of establishing that it has not breached section 73.1. The Union submitted that the Board ought to hear the evidence, rather than dismissing at this stage. Given that the onus lay with the Ontario Science Centre to establish why it had acted as it had, submitted the union, the Ontario Science Centre would have to prove it had not been acting on behalf of Modern. In light of the reverse onus, the union asserted that this application ought not to be dismissed as failing to disclose a *prima facie* case.

37. Subsection 73.1(9) reads as follows:

73.1-(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

It is unnecessary to decide here whether the reverse burden of proof applies to the issue of whether an entity or individual is an “employer”, and it is unnecessary to decide whether a responding party has the onus of proving it is not an “employer” within the meaning of section 73.1. We say

this because, regardless of onus, an applicant asserting that an entity is such an “employer” must plead an arguable case for such status. The mere assertion will ordinarily be sufficient, as the typical scenario involves an employer’s interactions with its employees. But here the allegation is that the Centre acted “on behalf of” Modern. An applicant must plead material facts sufficient to establish an arguable case in this regard.

38. Again, there will be circumstances which themselves arguably suggest that a particular entity or individual has been acting on behalf of the employer in question. Here, however, such an inference would be counterintuitive, and inconsistent with a realistic and reasonable appraisal of the workplace context, the relationship between the Ontario Science Centre and Modern, and the nature of the work.

39. Both parties referred to and relied upon the recent decision of the Board in *The Canadian Red Cross Society*, [1994] OLRB Rep. Jan. 34. Although that decision deals in large part with matters not here in issue, it does consider whether particular parties could be said to have been acting “on behalf of” the employer.

40. We agree with the comments of the Board in that case (at paragraph 47 therein) where it concluded that the Board ought to give the word “employer” a meaning most consistent with the purposes of the provisions in question. As the Board there concluded, the question of whether a person (or corporate entity) is “acting on behalf” of an employer is essentially factual in nature, and will depend on the particular circumstances. In paragraph 52 of that decision, the Board indicated that the reasons for an individual or person’s activities are relevant, as they must at least in part be to “provide some benefit to another or at the behest of another”, in order to fall within the ambit of the definition. We agree with these comments also. The reasons certain actions are taken, which may have the effect of assisting the employer, will be relevant in determining whether such actions can be said to be conduct taken “on behalf of” the employer.

41. Again, no facts are alleged here which could justify such a conclusion, nor do the circumstances support the inference that the Ontario Science Centre was doing this work in order to benefit Modern, or at the request of Modern. For these reasons, the Board concluded that the applicant had failed to demonstrate a *prima facie* case that the Ontario Science Centre had breached section 73.1 of the Act, and this aspect of the complaint was dismissed.

42. Turning to alleged breaches by Modern, the applicant alleged breaches of sections 73, 73.1 and 91.(7). There is however nothing before the Board, either in the materials filed or submissions at the hearing, which even arguably suggests a breach by Modern of the provisions of section 73 of the Act. That section speaks to strike-related misconduct and the services of “professional strike breakers”, as defined therein. Modern had its own bargaining unit personnel perform bargaining unit work during the strike, and the union argues that Modern thereby breached section 73.1. There are no material facts pleaded that would arguably support the proposition that Modern was somehow engaged in “strike related misconduct” within the meaning of section 73. Accordingly, the Board dismissed this aspect of the application.

43. With respect to the assertion that it had breached section 73.1 of the Act, the union based its submissions upon two sets of facts. First, the work done by bargaining unit personnel (as referred to paragraphs 19 and 20 of the particulars as amended, set out in paragraph 10 above) constituted a breach of this section, and secondly, the introduction and utilization of new industrial machinery, after the commencement of the first day of the strike (as set out in paragraph 21 of the amended particulars) also constituted a breach of this section.

44. With respect to the first circumstance, the Board was satisfied, and there was no serious

dispute, that the union had pleaded a *prima facie* case. Nevertheless, Modern argued that the Board ought to decline to entertain this aspect of the complaint on the grounds that it was “*de minimis*”; that is, the nature of the alleged breach was so trivial that it ought not to have been brought before the Board to begin with, and it would be counterproductive to sound labour relations for the Board to inquire further into the matter.

45. Section 73.1 is among the new provisions of the Act, establishing rights and obligations not before seen in the *Labour Relations Act*. These rights and obligations arise in a strike or lock-out context, an emotionally charged and often highly confrontational context. In these circumstances, absent a demonstration that the issues at hand are solely matters of principle without practical consequence, the Board would not be inclined to refuse to consider a matter because it is alleged to be trivial. If it were truly trivial, it would most likely have been resolved without resort to litigation. And even seemingly trivial issues can have large impact during strikes or lockouts. Accordingly, the Board ruled that the allegations contained in paragraphs 19 and 20 of the amended pleadings would proceed.

46. The second circumstance is the union’s assertion that the introduction of new machinery, as alleged in paragraph 21 of its amended particulars (see paragraph 10 above) constituted a breach of section 73.1 of the Act.

47. The union was unable to refer us to any particular subsection or provision in 73.1, or elsewhere in the Act, that supported its allegation that the introduction of this machinery was *per se* in breach of 73.1. It submitted however, that the Board ought not to dismiss this aspect of the complaint at this preliminary stage, as failing to disclose a *prima facie* case, but that the merits of this allegation were better addressed at the conclusion of the hearing. The clear intent of the provisions, dealing with replacement workers and the performance of struck work, submitted the union, was to enhance the ability of employees on strike to exert pressure upon the struck employer. For the Board to conclude, particularly on the basis of a preliminary objection, that the introduction of machinery that performs bargaining unit work is not prohibited by the Act would interfere with the right of employees under the Act to strike effectively.

48. Again, we might usefully refer to the comments of the Board in *Red Cross*:

• • •

40. There is no doubt that all of this provides the interpretative context in which we must apply sections 73.1 and 73.2. On the other hand, as eloquent as the unions’ arguments were with respect to the purpose of the amendments, legislative intent does not in itself provide freestanding rights, nor does it substitute for specific and substantive provisions. Legislative purpose only becomes meaningful as one part of the exercise of understanding and administering some concrete provision. As a result, we turn to the amendments themselves.

41. Section 73.1 sets out various kinds of prohibitions with respect to the performance of work during a strike. Those prohibitions relate to the type of person or employee involved, the nature of the work, the location of the work, reprisals, and certain conditions and definitions. Section 73.2 then provides exceptions to those prohibitions, various procedures and rights with respect to the performance of work in those exceptional conditions, a mechanism for agreement and provisions for directions and enforcement.

42. It is clear that these sections do not purport to ban the performance of the work of striking employees absolutely. For example, in addition to the named exceptions set out in section 73.2, the structure of section 73.1 permits the use of certain types of persons either explicitly or by omission. At the same time, however, it is also apparent that the prohibitions are very comprehensive in scope, particularly in the case of work performed at the strike location. The differences between the restrictions under section 73.1(5) at any place of operations operated by the

employer, and what is prohibited at the strike location by section 73.1(6) make it necessary for us to first determine whether the work in this case is being performed "at a place of operations in respect of which the strike or lock-out is taking place".

49. The replacement worker provisions represent a new legislative code which sets out various kinds of prohibitions with respect to the performance of work during a strike. The new restrictions do not ban outright the performance of all struck work by any means or any persons, but only in certain delineated circumstances. We see no provision within section 73.1 that suggests, even arguably, that the introduction of machinery is a proscribed method of having bargaining unit work performed during a strike. We do note that there is no assertion that the persons operating the machinery were working unlawfully. We conclude only that the introduction of the machinery to perform bargaining unit work is not itself in breach of section 73.1. Accordingly, this aspect of the complaint was also dismissed.

50. While the allegations contained in paragraph 21 of the amended pleadings do not arguably constitute a breach of section 73.1, it is arguable that they could reflect conduct in breach of the prior Memorandum of Settlement reached between the union and Modern. Accordingly, the Board earlier ruled that the allegations in paragraph 21 of the amended particulars could continue, but only with respect to the assertion that the facts as pleaded constituted a breach of section 91(7) of the Act.

51. For these reasons, the Board issued its prior decision. Shortly thereafter, the parties settled all matters remaining in dispute.

1824-94-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. N.S. Enterprises Limited, Responding Party

Build-Up - Certification - Board not persuaded that evidence reliably pointing to substantial build-up of work force within time frame anticipated by employer - Board declining employer's request to exercise its discretion to order representation vote when work force had "built-up" to more "representative" number - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *R. M. Sloan* and *C. McDonald*.

APPEARANCES: *Craig Grant*, *Daniel Kaplan* and *Mark Penfold* for the applicant; *Rosanne Angotti* and *Narine Sooknanan* for the responding party.

DECISION OF THE BOARD; October 13, 1994

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that the unit of employees appropriate for collective bargaining should be described as follows:

all employees of the respondent in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, office and clerical staff.

4. In its Response, the employer records that its correct name is "N.S. Enterprises Limited". That is the way that it has been described in this decision. At the hearing however, the owner of the employer indicated that the business was run by a numbered company: 599350 Ontario Limited. Accordingly, it is not entirely clear which corporate entity should be named in this proceeding. But until the union or the responding party otherwise advises, the Board will continue to use the corporate name recorded in the Response.

5. In accordance with the Rules of Procedure, respecting applications for certification, the employer has filed a list of employees in the bargaining unit at the time the application was made.

6. In support of its application for certification, the union has filed documentary evidence of membership or support in the form of cards. Those cards are signed by each employee, bear a date within the six month period immediately preceding the application date, and indicate that the employee wishes to be represented by the union in his/her employment relations with the employer. This documentary evidence is supported by a duly completed declaration verifying the documentary material.

7. On the basis of all of the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the responding party in the bargaining unit, on August 23, 1994, the application date, had applied to become members of the applicant on or before that date. In other words, the union has demonstrated the support of a "clear majority" of the employees in the bargaining unit and is therefore entitled to certification without a representation vote, unless the Board exercises its discretion to direct that such vote be taken.

8. The employer submits that, although the level of union support would ordinarily result in automatic certification, the Board should, nevertheless, exercise its discretion to order a representation vote. The employer submits that, at the time the application was made, the 13 employees in the bargaining unit were not a substantial or representative portion of the actual work force which, it said, was expected to increase significantly within a short period of time. The employer asserts that the bargaining unit is expected to include some 30 employees by mid-December, and that, in the circumstances, the Board should defer this certification application and hold a representation vote when the work force has "built up" to this more representative number.

9. The Board's approach to these "build-up issues" was summarized as recently as September 20, 1994 in *Kids Come First Child Care Centre of Vaughan and Canadian Union of Public Employees*, (Board File 1671-94-R) [now reported at [1994] OLRB Rep. Sept. 1235]. This is what the Board said in that case:

20. The Board has exercised its discretion to order a representation vote where the employees employed in the bargaining unit on the application date do not constitute a substantial representative number of employees in the ultimate bargaining unit. The policy behind the exercise of this discretion is summarized in the case of *Northland Power Partnership*, [1991] OLRB Rep. June 768 at paragraph 8:

The Board has recognized that there are circumstances in which it is appropriate to defer consideration of an application for certification. Where, for example, the Board is satisfied that an application is premature because a significant build-up of the work-force will take place within a reasonable period of time, the Board may defer consideration of the application, and order that a vote be taken at a time when a substantial representative number of employees are at work. This "build-up principle", as it is come to be known, represents an attempt to reconcile the right of present employees

to exercise their rights under the *Labour Relations Act* and the right of future employees to do so (see for example, *R. ex rel. United Steelworkers of America et al v. Labour Relations Board (Saskatchewan)* and the *Random Mines Ltd.* [1970] (7d) L.R. 3rd 1, 69 CLLC para. 14,205 (SCC); *Champlain Forest Products Limited* [1972] OLRB Rep. May 399; *Inco* [1973] OLRB Rep. March 172). This principle has been applied in limited circumstances (see, for example, *Emile Frant and Peter Waselovich* 57 CLLC para. 18,057; *F. Lepper & Son Ltd.* [1977] OLRB Rep. Dec. 846). More specifically, if the employees at work do not constitute a substantial and representative part of the workforce which is expected to be employed within a reasonable period, and the build-up does not depend upon factors beyond the employer's control, the Board may defer consideration of an application for certification or order a deferred vote.

21. Over the years the Board has developed some guidelines to assist it in balancing the rights of the two groups of employees described above. First, the Board requires that there be a real likelihood that a build-up will take place. Second, the planned build-up must take place within a reasonable period of time. Third, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If more than fifty per cent of the expected total are then employed, it is normally felt that the group is sufficiently representative and the Board will decline to exercise its discretion to order a representation vote. If less than fifty per cent of the expected total are then employed it is normally felt that the group is not sufficiently representative and the Board exercises its discretion accordingly. Fourth, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application (*F. Lepper & Son Ltd.* [1977] OLRB Rep. Dec. 846 at paragraph 10; *Brick Brewing Co. Limited*, [1985] OLRB Rep. Nov. 1557 at paragraph 6; *Champlain Forest Products Limited*, [1972] OLRB Rep. May 399 at paragraphs 6 and 7; *GSW Inc.*, [1990] OLRB Rep. May 535 at paragraph 3; *Hawk Security Systems Limited*, [1993] OLRB Rep. August 751, paragraphs 19 and 22).

10. In our view, this is a useful summary of the Board's approach to "build-up" questions and accurately identifies the factors which the Board normally considers in the exercise of its discretion. It must be remembered though, that this "build-up" question is being considered in a situation where the union appears to be certifiable under section 8 of the Act; moreover, as has frequently been said, time is of the essence in labour relations matters. There should be a good reason why the Board should delay disposition of a certification application - particularly where the applicant has met the statutory requirements for certification.

11. A hearing in this matter was held, in Toronto, on Tuesday, October 11, 1994. The purpose of that hearing was to receive the parties' evidence and representations on the "build-up issue" - and in particular, the employer's evidence, that there will be an increase in the number of employees in the bargaining unit, together with the likely time frame within which this employment level would be reached.

12. Having considered that evidence, the Board is not persuaded that a case for "build-up" has been made. To put the matter another way: the Board is not persuaded on the basis of the evidence before it that it should exercise its discretion to order a representation vote, or to delay the disposition of this application until mid-December.

13. The employer asserts that the work force will grow from about 13 workers as at the application date in August to some 30 workers as at mid-December. In support of that proposition the employer tendered a document (Exhibit 2) which was initially described as a "business plan", and which indicated that there would be 21 employees in the "fascia repair" area, and 9 employees in the "painting function". It was said that this expansion was necessary to accommodate a pur-

chase order that the employer had received from "Custom Racks Limited" and which called for average production of "3,300 pieces per month".

14. However, when this information is carefully examined (and subjected to cross-examination) it is much less clear that there will be a significant build-up, or that any significant build-up will actually occur by mid-December.

15. Mr. Sooknanan the president of the employer testified that Exhibit 2 was not in fact a "business plan" but rather a projection that he made *for the purpose of this hearing*. He said that there was no business plan, per se, nor were there any supporting documents for the disposition, or number of employees appearing on Exhibit 2. He admitted that the 9 individuals he had projected would be involved in the "painting function" were still problematic, because the company was still doing quality tests and would not actually receive this work until the customer was satisfied that its quality standards could be met. The 9 "future" painters were not part of the purchase order/contract requirements of Custom Racks, and in fact no firm purchase order requiring their work had been issued up to the date of the hearing.

16. The current work force of 16 individuals (only 2 more than in August) was producing an excess of 8,000 *pieces*. In cross-examination, Mr. Sooknanan admitted that the 3,300 piece purchase order was merely a "guide line" which had been significantly increased (apparently without any corresponding increase in the work force). He also testified that the company had been experiencing difficulties attracting employees who, he said, required at least three months training and evaluation before the company could be confident in their productive abilities.

17. In all the circumstances, we are simply not persuaded that the evidence reliably points to a substantial build-up of the work force within the time frame anticipated by the employer. No doubt Mr. Sooknanan *hopes* to expand and has taken some steps to facilitate expansion. But we are not satisfied that such expansion is so certain, significant, or imminent that the disposition of this application should be postponed, or that the union's certification should await a representation vote in December.

18. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on August 23, 1994, the certification application date, had applied to become members of the applicant on or before that date.

19. A certificate will issue to the applicant.

3782-93-JD International Brotherhood of Electrical Workers, Local 1788, Applicant v. **Ontario Hydro** and Electrical Power Systems Construction Association and Power Workers' Union, Responding Parties

Construction Industry - Jurisdictional Dispute - IBEW and CUPE disputing assignment of electrical construction work performed on 115KV transmission line between Ontario Hydro transmission stations - Board determining that work ought to have been assigned to IBEW

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *F. B. Reaume* and *H. Kobryn*.

APPEARANCES: *L. A. Richmond*, *J. Sprackett* and *H. Bartlett* for the applicant; *Scott T. Williams*, *Neil Donnelly*, *Finn Rimmier* and *Don Howat* for Ontario Hydro and EPSCA; *Chris Dassios*, *Wille Campbell*, *Mark Beaudette* and *Steve Reid* for Power Workers' Union.

DECISION OF THE BOARD; October 19, 1994

1. This is an application concerning a jurisdictional dispute filed pursuant to section 93 of the *Labour Relations Act* (the "Act") by the International Brotherhood of Electrical Workers, Local Union 1788 (the "applicant" or "Local 1788") against the Electrical Power Systems Construction Association ("EPSCA"), Ontario Hydro and Power Workers' Union, CUPE, Local 1000 ("Power Workers' Union"). This application was filed on February 4, 1994.
2. The Board held a consultation with respect to this application on October 4, 1994. When the consultation concluded on that day, the Board advised the parties that it would reserve its decision in order to permit the panel members to review the materials filed in light of the representations made.
3. The work in dispute involves the refurbishment of an existing, operational, 115KV powerline running between the Hawkesbury Transmission Station and the Cumberland Transmission Station ("Line 79M1"). The work was performed in three stages during the winter months of 1991-92, 1992-93 and 1993-94. The refurbishment of Line 79M1 involved the replacement of approximately 800-900 wooden poles, 400 structures (insulators, cross arms, crossbacks, guys and hardware) and 65 km of skywire. Given that Line 79M1 is estimated to be 90 km in length, it is apparent that the refurbishment of Line 79M1 resulted in the replacement of a significant portion, but not all, of the Line's components. The new structures and skywire perform the same function at the same capacity as those they replaced. For safety reasons, the new poles are approximately five feet longer than those they replaced. The conductors were not replaced. Once the new poles and structures were in place, the existing conductors were simply transferred to the new poles and the old poles were removed. The work in question was performed live line, meaning the line remained energized while the work was done. It is estimated that it took 20,000 person hours to complete all three phases of the refurbishment.
4. Ontario Hydro assigned the work in dispute to members of the Power Workers' Union. Local 1788 claims that the work should have been assigned to its members.
5. In determining whether to allow the application the Board has considered those factors relied on by the parties in their materials and oral submissions, namely: collective bargaining relationships; the existence of trade agreements or jurisdictional conventions; past practice; skill and ability; and economy and efficiency.

6. Both Local 1788 and the Power Workers' Union argued that the other's collective agreement did not cover the work in dispute.

7. Article 2 of the Principal Agreement for Transmission System Construction in the Electrical Power Systems Sector between EPSCA and Local 1788 (the "Local 1788 agreement") provides, in part, as follows:

Scope of Agreement

EPSCA recognizes the Union as the exclusive bargaining agency for a bargaining unit as defined in Item B engaged in all construction industry work performed on transmission systems for Ontario Hydro on Ontario Hydro property in the Province of Ontario. This work includes the construction of Lines over 50KV....

Item B contains the following classifications:

Electrician Journeyman including Foreman and Subforeman
Electrician Apprentice
Lineman, Journeyman including Foreman and Subforeman
Communications Electrician
Lineman Apprentice/Learner
Electrical Welder
Ground Work Foreman and Subforeman
Groundman
Groundman Driver
Groundman Operator
Utilityman

8. Article 4 of the Local 1788 agreement, obliges EPSCA to advise Local 1788 of "new major Transmission Systems Division work". We do not read Article 4 as limiting or restricting the scope of the Local 1788 agreement. We find that the scope of the Local 1788 agreement is sufficiently broad to encompass all transmission systems construction work whether it is "new" (also referred to by the parties as "greenfields") or not. (We note that Local 1788 was not advised of the work in dispute.)

9. We further find that the work in dispute is transmission systems construction work. The refurbishment of Line 79M1 involved removing virtually all of the Line's old components, except for the conductor, and replacing them with new components. Line 79M1 was not preserved by the performance of the work in dispute, it was replaced. Further, when viewed in context, it is apparent that the refurbishment of 79M1 was a significant endeavour. None of the parties could point to a single similar refurbishment project which came close to the size and extent of the refurbishment of Line 79M1 either in terms of length or number of components replaced. The number of poles replaced in the course of refurbishing Line 79M1 equals or exceeds the total number of poles replaced by Ontario Hydro throughout the entire Province of Ontario during 1988 and represents 1.25 percent of all poles presently in existence throughout the Province of Ontario.

10. Thus, we find that the scope of the Local 1788 agreement is sufficiently broad to encompass the work in dispute.

11. The collective agreement between Ontario Hydro and the Power Workers' Union does not explicitly cover construction electricians. Employees represented by other bargaining agents are explicitly excluded from the scope of the agreement. A job description for the classification "Regional Maintainer, (Lines)" (the classification which primarily performed the work in dispute) forms an addendum to the collective agreement. The job description indicates that the primary function of the classification is to:

Construct and maintain transmission and distribution lines and associated apparatus. Maintain power service to electrical customers.

12. Given our determination of this matter on the basis of the remaining factors, we are willing to assume, without so finding, that the work in dispute is also covered by the collective agreement between the Power Workers' Union and Ontario Hydro.

13. The creation of a trade agreement or jurisdictional convention requires the knowledge and agreement of the trade unions alleged to be bound thereby. No such agreements or conventions were put before the Board. We find that there are no trade agreements or jurisdictional conventions in existence which govern the assignment of the work in dispute between these parties.

14. We note that none of the past practice evidence relied upon relates to the refurbishment of a powerline of the size or extent of the project in dispute. The parties are agreed that the refurbishment of Line 79M1 is, by far, Ontario Hydro's largest powerline refurbishment to date.

15. In the present case, virtually all of the past practice evidence *relating to the refurbishment of powerlines* relied on by the Power Workers' Union was unknown to Local 1788 and vice versa. There is no mechanism for Local 1788 to be advised of all work assignments made to the Power Workers' Union or vice versa. Further, it is not unusual for work similar to the work in dispute to be performed in remote, isolated areas where it would not be noticed. As a result, although Local 1788 was able to adduce evidence of its members having performed refurbishment work on powerlines to a greater degree than the Power Workers' Union, the work relied upon was not known to the Power Workers' Union and hence we do not view it as determinative.

16. The past practice evidence adduced *which both unions were aware of* does not relate directly to work of the sort in question here. It establishes that Local 1788 members have always performed greenfields construction of transmission lines. Members of Local 1788 have built virtually every transmission line of 50KV or over throughout the Province of Ontario. Such evidence establishes that members of the Power Workers' Union make up maintenance crews which continually check the transmission lines for signs of decay or deterioration. Where deterioration is discovered, replacement of a pole or other component is carried out by members of the Power Workers' Union. Accordingly, the past practice evidence of which both unions were aware establishes that members of Local 1788 build new transmission lines and members of the Power Workers' Union check and maintain them or, perhaps, do minor construction.

17. In our view, Local 1788's past practice more closely resembles the work in dispute and thus supports its claim to the work.

18. We find that members of both the Power Workers' Union and Local 1788 have the necessary skill and ability to perform the work in dispute such that skill and ability is a neutral factor. Local 1788 has 62 members who are certified as construction powerline workers and six apprentices. (The work in question did not require more than four to six powerline workers at any one time.) Construction powerline workers are trained in live line work.

19. The Power Workers' Union asserts that it is more efficient to use the travelling crews composed of qualified members of the Power Workers' Union to perform the work in dispute than it is to use a newly created crew of hiring hall based Local 1788 members. Local 1788 asserts that it is more efficient to assign performance of the disputed work to members of Local 1788 as the Local 1788 collective agreement maximizes the ability to hire, retain and lay-off qualified trades people on demand. As indicated above, the refurbishment of Line 79M1 was the first refurbishment of its size and the job more closely resembles work which members of Local 1788 typically perform than

that performed by members of the Power Workers' Union. Local 1788 members have familiarity with performing work which most closely approximates the work in dispute. Thus, we are not persuaded that a crew of members of the Power Workers' Union would be able to perform the work more efficiently than a crew of members of Local 1788. We find that economy and efficiency appears to favour assignment of the work in dispute to Local 1788.

20. Having regard to the all of the relevant factors we find that the relevant past practice and economy and efficiency favour assignment of the work in dispute to Local 1788. The remaining factors are neutral. Accordingly, the Board has determined that the application should be allowed.

21. The Board declares that the work in dispute; namely electrical construction work performed on the 115KV transmission line between Hawkesbury Transmission Station and Cumberland Transmission Station including replacement of poles, skywire and structures (consisting of insulators, cross arms, crossbacks, guys and hardware) should have been assigned to members of the applicant and, to the extent such work remains to be completed, Ontario Hydro is hereby directed to assign such work to members of the applicant.

1903-94-R United Food and Commercial Workers Union, Local 633, Applicant v. R.J. Chartrand Holdings Limited c.o.b. as Chartrand's Your Independent Grocer, Responding Party v. Group of Employees, Objectors

Certification - Charges - Intimidation and Coercion - Petition - Membership Evidence - UFCW applying to represent bargaining unit of grocery store's meat department employees - Board according no weight to timely petition making reference to RWDSU and signed by employees before UFCW membership evidence collected - Board dismissing employer's allegations that membership evidence collected through intimidation and coercion - Certificate issuing

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *S. C. Laing* and *C. McDonald*.

APPEARANCES: *Bernard Fishbein* and *Robin McArthur* for the applicant; *R. W. Kitchen* and *R. J. Chartrand* for the responding party; *Chuck Needham* for the objectors.

DECISION OF THE BOARD; October 11, 1994

1. The style of cause of this proceeding is amended to reflect the correct name of the responding party employer: "R.J. Chartrand Holdings Limited c.o.b. as Chartrand's Your Independent Grocer".

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

4. The applicant (also referred to as the "union") seeks to represent the Meat Department employees of the responding party in the town of New Liskeard. As a result of discussions between the parties, three issues were to be argued before the Board at the hearing. However, at the commencement of the hearing the responding party, the "employer", indicated to the Board that it

had withdrawn its issue regarding the geographic scope of the bargaining unit. Having regard to the agreement of the parties, the Board finds that:

all Meat Department employees of R.J. Chartrand Holdings Limited c.o.b. as Chartrand's Your Independent Grocer in the Town of New Liskeard, save and except Meat Manager and persons above the rank of Meat Manager,

constitute an appropriate unit for collective bargaining.

5. The application for certification was filed on August 30, 1994. On August 29, 1994, the Board received a document dated August 19, 1994, signed by sixty-six employees, which stated as follows:

To whom it may concern

We the employees of Chartrand's Your Independent Grocer wish [sic] to file a complaint against R. W. D. S. U. "Retail Wholesale Department Store Union" and its representative.

They have harassed us by repeatedly calling our homes after receiving a "NO" answer every-time or by late phone calls after 11:00 pm and later. Disturbing family member. They have also followed us to public places, disturbing and intruding.

We would like to put an end to this immediately.

We the employees of Chartrand's Your Independent Grocer are very satisfied with our employer and do not feel that we need to be represented by any trade union.

6. The applicant made a preliminary motion requesting that the statement of desire outlined above be given no weight. It argued that the statement of desire refers to the Retail Wholesale Department Store Union, and not to the applicant union, the United Food and Commercial Workers, Local 633. The applicant also indicated that the membership evidence collected by the applicant union was collected on August 29, 1994, whereas the statement of desire was signed by employees on August 19, 1994, so that the cards signed are representative of employee wishes at a later date and for a different union than when the statement of desire was circulated. In addition, the union in the present application only organized the eight Meat Department workers, not the whole grocery store. Hence, the applicant argued that the documents filed with the Board on August 29, 1994, are not statements of desire with respect to this application for certification, and in any event, do not disclose that the employees for whom the union submitted membership evidence had a change of heart after they had signed membership cards for this union.

7. The responding party and the objecting employees made no submissions with respect to this motion.

8. Having considered the applicant's submissions, the Board granted the union's motion and decided that the documents filed by the objecting employees on August 29, 1994, would be given no weight. These are our reasons for that decision.

9. Section 8(4)-(5) of the Act states as follows:

8.-(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.

2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

(5) The Board shall not consider evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed on or before the certification application date unless it is in writing and signed by each employee concerned.

10. Section 8(4)2 requires that the Board only consider the evidence of employees who have applied to become members of a trade union and then have had a change of heart if they file such evidence prior to the certification application date for that trade union. Employees must indicate to the Board, in writing and with signatures, the nature of their concern about membership evidence which may be filed on their behalf in support of an application for certification. For our purposes, what is critical is that the evidence must relate to or suggest that an employee who had previously become a member or applied to be one no longer wishes to be represented by the union. Here, the petition is signed, and forwarded, prior to the signing of the membership cards relied upon by the union. Since the membership cards were signed subsequent to the petition, the petition cannot cast doubt on the wishes of those employees who signed cards.

11. As well, the statements of desire filed bear no relation to the application filed by the United Food and Commercial Workers Union (also referred to as the "UFCW"), Local 633, or indeed to any UFCW local. The statements of desire indicate that on August 19, 1994, the petitioners wanted to file a complaint against, and did not want to be represented by, the Retail Wholesale Department Store Union (also referred to as the "RWDSU"). However, ten days later on August 29, 1994, the majority of the employees of the Meat Department did sign UFCW, Local 633 membership cards. We cannot see how a statement opposing the representation by RWDSU can cast doubt on the wishes of those who later signed cards for UFCW, Local 633.

12. Given the timing and the identity of the union the petition references, we decided that the document filed on August 29, 1994, by the group of objecting employees, would be given no weight in our deliberations in this application.

13. The final issue to be decided was the applicant's motion that the Board should dismiss, without a hearing, allegations made in the employer's response that the union organizer had engaged in improper conduct in mid-August, 1994, during the organizing drive and had sought by intimidation and coercion to compel employees to join the union. The union argued that even if the Board accepted as true all of the allegations made in the response, there would be no grounds for the Board to dismiss the application or to order that a representation vote be held, the remedies the responding party was seeking. The union premised its argument on Rule 24 of the Board's Rules of Procedure. However, Rule 24 more properly applies to the way in which the Board may consider written material filed prior to a hearing. In this case, the question for the Board to consider was whether the allegations in the response, even if all taken to be true and provable, disclosed a *prima facie* case.

14. Having heard the submissions of the applicant and the responding party (the objecting employees made no submissions), the Board ruled orally that the responding party's allegations of improper conduct were dismissed. These are our reasons for that decision.

15. It was not disputed that the two employees referred to in the employer's allegation were not employees of the Meat Department, were not persons who could fall within the agreed bargaining unit, and neither had signed a membership application in support of the present application for certification. UFCW, Local 633 is a quasi-craft local which encompasses meat cutters. The union conceded that the organizer in question was an organizer for the union and as such was a representative of the union.

16. The employer argued that notwithstanding that the employees who were the subject of the allegations were not going to be in this bargaining unit, or in the department affected, since the union organizer had made threats of economic reprisals in unidentifiable future workplaces, the Board should therefore hear the evidence of the allegations.

17. The Board requires a high degree of integrity on the part of union officials involved in organizing drives, and where the Board finds that the union organizer has acted improperly in the conduct of the organizing drive, the Board may conclude that it cannot place reliance on any of the membership evidence submitted by the union in support of its application for certification. In making its assessment in each case, the Board considers whether the impugned coercive action would cause the reasonable employee to act contrary to his or her inclination. (See *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. August 611). Where employees have signed cards as a result of coercive conduct by a union, the Board has discounted the membership evidence of such individuals and, in some cases, dismissed the applications for certification.

18. In the case before us, the responding party is seeking to have the Board hear evidence of threatening comments alleged to have been made in the course of a different organizing drive than the one which led to the application before us. In addition, the employees in question are not affected by the present application, and, in any event, did not sign cards in support of the union.

19. There was no dispute that all of the membership evidence filed by the union in support of this application relates to Local 633 of the UFCW, and does not relate to the RWDSU, and that it was all collected on August 29, 1994, sometime after the original RWDSU campaign to organize the whole grocery store operated by the responding party had been abandoned. While the Board considers seriously allegations of union organizer impropriety, there must be some nexus between the conduct complained of and the organizing drive which culminated in the application for certification before the Board. In the circumstances of this case, there are no material facts alleged which sufficiently link the original RWDSU organizing drive in the entire grocery store, and the subsequent UFCW, Local 633, application filed in respect of only the Meat Department. It was therefore unnecessary for the Board to hear evidence with respect to the allegations made by the responding party in its response.

20. For the above reasons, the Board dismissed the responding party's allegations for want of a *prima facie* argument.

21. The application for membership cards are signed by each employee concerned, are dated within the six-month period immediately preceding the application date, and are supported by a duly completed Declaration Verifying Membership Evidence.

22. On the basis of all of the evidence before it, the Board was satisfied that more than fifty-five per cent of the employees of the responding party in the bargaining unit on August 30, 1994, the certification application date, had applied to become members of the applicant on or before that date.

23. In its oral decision of October 3, 1994, the Board had therefore indicated that a certificate would issue to the applicant.

3183-91-JD Labourers International Union of North America, Ontario Provincial District Council Locals 506 and 1081, Applicant v. **Robertson Yates Corporation Limited**, United Floor Company Ltd., United Brotherhood of Carpenters and Joiners of America, Local 785, Responding Parties

Construction Industry - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Reconsideration - Labourers' union and Carpenters' union disputing assignment of work related to fabrication, installation and dismantling of bulkheads in Board Area 6 in ICI sector - Board directing that work be assigned to Carpenters - Labourers' union requesting reconsideration on various grounds, including assertion that "consultation" procedure violating rules of natural justice - Application for reconsideration dismissed

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Larry Steinberg* and *Susan Philpot* for Labourers, Ontario Provincial District Council; *Tony Cornacchia* for Labourers 506; *Keith Rimmington* for Labourers Local 1081; *David Cowling*, *Wally Thornton*, *Frank Calvi* and *Vince Panetta* for United Floor Company Ltd.; *N. L. Jesin* and *K. Ball* the United Brotherhood of Carpenters and Joiners of America, Local 785; no one appeared for Robertson Yates Corporation Limited.

DECISION OF THE BOARD; October 14, 1994

1. This is a complaint concerning work assignment pursuant to section 93 of the *Labour Relations Act*. The Board held a consultation with the parties. After reviewing the extensive filings submitted pursuant to the Rules of Procedure and the oral representations made by the parties during the consultation, the Board gave an oral decision regarding the work in dispute in favour of the Carpenters union. Herewith are the reasons for that decision.

2. For ease of reference the complainant, Labourers International Union of North America, Ontario Provincial District Council Locals 506 and 1081 will be referred to as "the Labourers". The responding parties Robertson Yates Corporation Limited will be referred to as "RYCO"; United Floor Company Ltd. as "United Floor"; United Brotherhood of Carpenters and Joiners of America, Local 785 as "the Carpenters".

3. The parties disagreed over the scope of the work in dispute. The Labourers described the work in dispute as follows:

II - DETAILED DESCRIPTION OF THE WORK IN DISPUTE

17. All work in connection with the handling, distribution, pouring, placing and finishing of concrete floor construction to "superflat" precise tolerances including the installation of bulkheads or screeds ("the work in dispute") at the Toyota Motor Manufacturing Inc., 1993 Production Control Expansion, Cambridge Plant, Cambridge, Ontario ("the Project").

18. The term "superflat" is one coined by Duron Ontario Limited ("Duron") and originally

referred to the particular product and technique developed by Duron for producing a concrete floor in respect of which the deviation in the level of the floor is minuscule. The particular Duron brand of floor, the **SUPERFLAT FLOOR** is a floor with an "F" number of F100 or higher. The "F" number is a system of measurement and describes the deviation or "tolerance" within which the flatness may vary. The higher the number, the flatter the floor. This system of measurement using "F" numbers is the form of measurement accepted by professional engineering societies (see Declaration of Armando Silvestri, para. 5-7).

19. The brand name **SUPERFLAT** has taken on a more generic trade usage and "superflat" now refers to floors whose "F" specifications are F40 and higher. The "F" specification for the floor at the Project was F75.

The Carpenters describe the extent of the disputed work as:

PART B - Detailed Description of Work Performed

3. The work is comprised of all work in connection with the fabrication, installation, and dismantling of wooden bulkheads at the Toyota Plant Expansion, Cambridge, Ontario. The bulkheads in question are approximately 8" high.

4. Local 785 does not claim any work in connection with the pouring, placing or finishing of concrete floor. Local 785 therefore does not agree with paragraphs 17, 18 and 19 as set out in the Applicant's brief.

4. The work was performed at the Toyota Plant in Cambridge, Ontario. RYCO was the general contractor on the Toyota project. RYCO subcontracted the work as described by the Labourers to United Floor. RYCO is bound to both the Labourers and the Carpenters provincial agreements. United Floor is bound by the Labourers provincial agreement but does not have an agreement with the Carpenters. The work in dispute was performed by United Floor using Labourers.

5. Counsel originally retained by RYCO was present at the consultation but indicated that RYCO would not be participating but would provide information.

6. The work of pouring, placing or finishing the concrete floor is not being claimed by the Carpenters. It is clear from the submissions of both unions that the portion of the work in dispute is the fabrication, installation and dismantling of wooden bulkheads. Both the Carpenters and the Labourers agreements claim jurisdiction over building bulkheads. Members of both unions have performed the work. When looking at past practice in the context of an employer who has an agreement with only one of the unions to the dispute, this practice is of little value when deciding who the work is to be assigned to. RYCO is in a difficult position faced with competing claims in two provincial agreements to which it is bound. Unfortunately in the construction industry there are many collective agreements with competing jurisdictional claims.

7. Based on the materials filed and the oral representations at the consultation it is the Board's view that in Board Area 6 in the ICI sector the practice of general contractors is to assign work in connection with building bulkheads and/or forms to receive concrete floor construction to the Carpenters. It is not disputed that when RYCO performs this work with its own forces it assigns work in connection with building bulkheads and/or forms to receive concrete floor construction, to the Carpenters.

8. It is the Labourers position that in these particular circumstances the fabrication and installation of the bulkheads cannot be considered in isolation when determining the proper work assignment. The project at Toyota involved the installation of a "superflat" floor. This type of floor is described in Armando Silvestri's declaration filed with the Board. Duron Ontario Ltd.

(Duron) developed this type of floor initially for Ontario Hydro in 1978. Mr. Silvestri's declaration reads in part:

5. The term "superflat" is one coined by Duron and originally referred to the particular product and technique developed by Duron to produce a concrete floor that was as flat as possible. That particular product is a floor in respect of which the deviation in the level of the floor is minuscule. The deviation or "tolerance" within which the flatness may vary is measured by a system of "F" numbers. The higher the number, the flatter the floor. The particular Duron brand of floor, the **SUPERFLAT FLOOR**, is a floor with an "F" number of F100 or higher.

6. Over time, with the growth of the demand for "superflat" floors and with the development by a few other flooring contractors of the capacity to construct "superflat" floors, the brand name **SUPERFLAT FLOOR** has taken on a more generic trade usage and "superflat" now refers to floors whose "F" specifications are F40 and higher. This "F" number measurement system has been accepted by professional engineering societies and is now used in plans and specifications.

7. The flatness of a concrete floor is measured with an instrument called a profileograph and, as indicated above, the flatness measurement is expressed in an "F" number. And, while "SUPERFLAT" floors carry an "F" number of F100 and higher, normal wet screed concrete floors have a maximum "F" number of F25. Any Floor which carries an "F" number of F40 and higher is considered a "superflat" or high tolerance floor and the process for attaining a flatness of F40 or higher is the same as that for achieving a "superflat" floor of F100 or higher. For ease of reference throughout, the phrase "superflat" floor will be used and will include a floor with an "F" number of F40 or higher.

8. In the construction of "superflat" floors, Duron uses a specially trained crew, comprised of cement finisher members of the Labourers', who are involved in each step of the process necessary to construct the floor and their involvement in each step is critical to ensure the quality of the floor. This crew would accordingly be responsible to install and set the bulkheads, mount and operate the screeds, and pour and level the concrete.

9. The specialized and precise cement finishing technique involved in the construction of "superflat" floors is a multi-step process and can be outlined as follows:

- (a) A very critical component of the cement finishing process commences with the installation of the specially-designed wooden or steel bulkheads, once the fine grading and compaction have been completed. These bulkheads are designed to support a heavy-duty vibratory screed and are installed by the cement finisher members of the Labourers'. Unlike ordinary bulkheads on a conventional concrete slab on grade job, which are designed to simply retain the normal-slump concrete, "superflat" slab bulkheads are heavily braced and laid in strips averaging 16 feet wide. These 16 foot-wide strips are not a form to contain concrete, but provide the set of tracks along which the heavy-duty vibratory screed rides. Once the concrete is poured, the bulkheads support this heavy-duty mechanical screed which is required to handle the specified grade of low-slump concrete which is used on these floors. This heavy-duty mechanical screed is the critical element in the cement finishing process for "superflat" floors. The strips themselves range in length depending on the size of the job, but can be over 600 feet long. Once the concrete is poured, the mechanical screed travels on the entire length of the bulkheads, vibrating the concrete to a level precisely flush with the top of the bulkheads.
- (b) Because one of the major differences between "superflat" and conventional flat slab construction lies in fabrication and positioning of the bulkheads, there are two steps in the bulkhead installation process which are critical to the ability to attain "superflat" floors. The first involves the construction by the cement finisher member of the Labourer's of a specially designed bulkhead which must be heavily braced in order to support the heavy-duty mechanized vibratory screed which will travel along it once the

concrete has been poured. The technique required for “superflat” floors is that the bulkheads be rendered immovable, whereas conventional bulkheads do not require the same degree of solidness. Knowledge and familiarity with the operation of the heavy-duty mechanized vibratory screed is essential to this bulkhead installation.

Secondly, because the top of the bulkheads provide the precise level of the top of the concrete, the concrete ultimately being flush with the top of the bulkheads, the flatness of the bulkheads must be precise. To achieve this, the cement finisher member of the Labourers’ erects the bulkheads initially as close as possible to the final elevation of the floor. The plate (bottom of the bulkhead) is laid down first. Then, with the assistance of a laser or engineer’s level, the cement finisher checks the levelness of the top of the bulkhead.

Once the bulkheads are installed, the flatness of the top of the bulkheads is checked longitudinally and any high spots are planed off. The bulkheads are then checked across the strip using a straight edge to which a machinist’s level has been secured.

- (c) Once the dowels have been set along the length of the bulkheads by the cement finisher, the concrete is poured in whole strips, one strip at a time and only in alternating strips. Once the concrete is poured, a heavy-duty mechanical screed is placed on the bulkheads which act as a track to guide and support the cement finishing screed machine, and vibrates the concrete to the proper elevation. Once the power screed has passed over the strip, a handheld magnesium straight edge is used by the cement finisher latitudinally to ensure that the concrete is flush with the top of the bulkheads. At least two and sometimes three passes are made with the magnesium straight edge, the guide being the top of the bulkheads. Finally, a highway straight edge is used by the cement finisher across the strip, over and over again, up and down the length of the strip, to attain the final flatness required for these floors.
- (d) Once the concrete is poured and has set in the alternating strips, the bulkheads are removed and the same process for pouring and levelling the concrete is applied in between the strips. The bulkheads are no longer necessary at this point because the screed machine runs along the “superflat” strips of dried concrete on either side of the second round of pours. Because the already-poured concrete provides the tracks for the screed machine and allows the second set of strips to be finished, it is essential that the initial strips, and the bulkheads, have been precisely laid.
- (e) The final step in the process is the checking of the flatness of the floor with the profileograph. This is the method by which the owner can ensure that the specialty floor finishing contractor has produced a “superflat” floor.

10. In addition to the need for the skills and experience of a cement finisher member of the Labourers’ to properly install the bulk-heads and screed, in constructing a “superflat” floor, it is the most economic and efficient use of labour to ensure that the entire crew has the skill, training and experience necessary to perform each aspect of the “superflat” floor construction process. Depending on the size of the job, it may take only a half-day to install and set the bulkheads and mount the screed. It would be uneconomical to hire carpenters through the hiring hall for a half day of work.

11. In addition, because of the highly skilled and precise nature of the “superflat” floor finishing process, it would be uneconomical and inefficient to be required to hire carpenters through the hiring hall to install the bulkheads. The installers of the bulkheads and screeds must be experienced and skilled at the “superflat” floor finishing process. The concrete floor contractor could not deliver a “superflat” floor if it was required to train carpenters referred from the local

Union hiring hall to perform superflat bulkhead installation each time a construction job, anywhere in the province, required bulkhead installation.

9. In terms of skill and ability the greater precision required in setting the bulkheads would favour the Carpenters who use precision optical instruments as tools of their trade. The Board accepts the submissions set out in Mr. Silvestri's declaration including the fact that there are specially trained members of the Labourers who possess the skills to do the work claimed by the Carpenters. However special training and expertise acquired by one trade union, especially while in the employ of a single trade or specialty contractor, cannot be used to support a claim to take away trade jurisdiction from another union.

10. Economy and efficiency is one of the criteria the Board looks at when determining trade jurisdiction. There are no submissions from RYCO with respect to the economy and efficiency of using one trade over another to perform the disputed work.

11. As stated earlier the Board had given an oral ruling that the fabrication, installation and dismantling of wooden bulkheads is the work of the Carpenter. The work was improperly assigned and pursuant to section 93 of the *Labour Relations Act* the Board directs that:

RYCO shall assign to the Carpenters all fabrication, installation and dismantling of bulkheads in Board Area 6 in the ICI sector.

12. Prior to the written reasons issuing the Labourers requested reconsideration of the Board's oral ruling. The grounds for the reconsideration are set out in Schedule "A" of the Labourers' Request for Reconsideration. The Labourers requested the Board reverse its "bottom line" ruling that "the work in dispute is Carpenters' work and find that the work in dispute is the work of the Labourer's.

13. The reasons for the request are set out in paragraph I of Schedule "A":

I REASONS FOR REQUEST

This request for reconsideration is based on the fact that the Board made obvious errors, failed to permit the Applicant an opportunity to make representations on material facts and, as a matter of policy, failed to consider and apply its well established jurisprudence to the facts. In particular the Board:

1. Ignored its previous jurisprudence and thereby either incorrectly determined or failed to determine the particular work in dispute.
2. Failed to consider the employer and area practice evidence before it.
3. Failed to comply with the rules of natural justice.
4. Failed to follow its own jurisprudence as to the content of a consultation.

14. The reconsideration request is summarized below. The Labourers object to the Board determining the work in dispute in the absence of the parties agreement. The Labourers disagreed with the Board's conduct of the consultation and the Board's refusal to allow additional evidence to be called. The applicant submits the Board has failed to act in accordance with the rules of natural justice in the following ways:

- (i) it refused the parties the opportunity to make submissions with respect to the particular work in dispute;
- (ii) it refused both the Labourers and United Floor the opportunity to call evidence as to

why the particular skill and knowledge of cement finishers is necessary in order to install bulkheads on superflat floors;

- (iii) it refused to hear submissions in respect of the relevance of the documentary evidence filed by the Carpenters;
- (iv) it refused to allow the Labourers to call Mr. Armando Silvestri to explain part of his Declaration;
- (v) it refused to allow the Labourers and United Floor to make submissions as to the issue of the employer and area practice evidence;
- (vi) it refused to permit counsel for United Floor to make any comments at all at the conclusion of the proceeding.

15. The Labourers referred the Board to section 104(13) which states:

104.-(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceeding to present their evidence and to make their submissions.

In paragraph 4 the applicant states:

4. Consultations - According to the Board

Even in the event that Section 104(13) of the Act does not apply to consultations, at the very least, the Board's comments in *Ontario Hydro* [1993] O.L.R.B. Rep. May 442, should guide the Board's conduct during a consultation. In that decision, the Board stated at paragraph 10:

"In this case, the Board found it appropriate to schedule a consultation, a proceeding which is something less than a hearing in the traditional sense. Nevertheless, a consultation is an opportunity, perhaps the only opportunity, for the parties to a jurisdictional dispute complaint to address the Board with respect to the matter. The rules of natural justice do not apply to such a proceeding in any traditional sense. However, the parties are afforded the opportunity to refer to the extensive materials which they are required to file in such cases, and to make representations with respect to how the Board should proceed, including whether the Board should hear evidence or otherwise hold a hearing on any matter or issue) or dispose of the complaint."

In our case, the Board did not afford the parties any opportunity to refer to the extensive materials filed, nor did the Board allow the Labourers or United Floor to make representations with respect to how the Board should proceed, or how the complaint should be disposed of. In fact, the parties requested an opportunity to call evidence, indicated the reasons for that request and asked for an opportunity to make submissions in respect of various issues which were raised by the Board as issues in dispute. All those requests were refused without reason.

The Board has denied the Labourers their right to natural justice in determining this jurisdictional dispute complaint. Whatever the standard required in a "consultation", the Board has not met that standard. Once the Board has determined that it will hold a consultation, it must act judicially in doing so. By raising a variety of issues in the Consultation and subsequently refusing the parties any opportunity to address those issues in any meaningful way, through evidence and submissions, the Board has acted unfairly.

For the foregoing reasons, the Labourers hereby respectfully request that the Board reconsider its decision of June 23, 1993, that "the work in dispute is Carpenters work."

16. Dealing first with the description of the work in dispute. The parties to this dispute had the opportunity to make full written submissions with respect to all the material and information they wished to put before the Board. The written submissions were precise in terms of how each union viewed the disputed work. The pouring and screeding of the concrete is not claimed by the

Carpenters. The Labourers took the position the work in dispute must be viewed as one operation and that the installation of the bulkheads cannot be dealt with separately.

17. The panel reviewed and considered all of the submissions and materials filed and decided it did not need to hear additional evidence. The Board accepted the oral and written submissions of the parties. There was no need to have Mr. Silvestri explain his very written detailed declaration of what is involved in the construction of a superflat concrete floor. The Board understood the applicant's position. The Board disagreed with the applicant's assertion that these "superflat" concrete floors should be viewed differently from other concrete floors.

18. Extensive materials were filed in this jurisdictional dispute. The panel was satisfied it had sufficient material before it to make its determination. The Board in paragraph 9 of *Ontario Hydro, supra*, stated:

For years prior to January 1, 1993, the construction labour relations community cried out for a more responsive and expeditious jurisdictional dispute process before the Board. On January 1, 1993 the present section 93 of the *Labour Relations Act* came into effect. This provision is a response to the community's call and contemplates a much more expeditious procedure. The Board's new Rules of Procedure with respect to jurisdictional dispute (Rule 72-76) complement the new section 93 of the Act and also contemplate a radically expedited procedure. The Act and the Rules both contemplate that a complaint concerning work assignment may be disposed of without an oral hearing. The Act specifically gives the Board a discretion with respect to whether or not it will entertain a jurisdictional complaint, and also with respect to how the Board proceeds with a complaint it decides to entertain (section 93(1.1)). The Act goes on to provide that the Board may make any interim or final order it considers appropriate after holding a consultation or a hearing (section 93(1.2)).

19. The Board accepted the submissions with respect to United Floor's practice. However past practice when developed in the absence of the other trade union to the jurisdictional dispute having any agreements or input in the development of that practice is not very helpful.

20. United Floor requested reconsideration of the Board's decision supporting the Labourers' request for reconsideration. The reasons for their request are basically the same. The main issue is the description of the work in dispute and their inability to call further evidence in addition to the written materials before the Board. It is important to note that the work was assigned by RYCO by awarding the disputed work to United Floor, a subcontractor who had an agreement with the Labourers but not the Carpenters.

21. Under the provisions of the Act and the Rules with respect to filing of jurisdictional disputes the parties are required to file briefs stating the issues in dispute including a detailed description of the work in dispute and the facts on which they intend to rely. Rules 72, 73, 74, 75 and 76 state:

72. An applicant must file with the application, and every responding party must file with any response,

- (a) any collective agreement;
- (b) any agreement or understanding between the trade unions as to their respective jurisdictions or work assignment;
- (c) any agreement or understanding between a trade union and an employer as to work assignment;
- (d) any decision of any tribunal respecting work assignment; and

(e) any other document,

relating to the work in dispute which may be in their possession and on which they intend to rely to support their claim for relief or that the relief asked for should not be given, and a statement about any area or trade practice relating to the work in dispute, and pictures, diagrams or drawings of the disputed work.

73. Each party must also file at the same time as they file an application or response a brief which contains a statement of the issues in dispute, including a detailed description of the work in dispute, and the facts on which they intend to rely.

74. Each party must deliver the documents set out in Rules 72 and 73 to the other parties before filing them. Each party must, at the time of filing, verify to the Board in writing that they have delivered the documents as required by these Rules.

75. The responding parties' materials must be delivered and filed within 10 days of delivery of the application.

76. Where the Board is satisfied that a case can be decided on the basis of the material before it, and having regard to the need for expedition in labour relations, the Board may decide an application under section 93 of the Act without an oral hearing.

22. The parties filed extensive materials with the Board. The briefs from the Labourers, United Floor and the Carpenters were detailed and helpful to the Board. The declaration from Mr. Silvestri was very detailed and clearly sets out the process of installing "Superflat" floors. Photographs submitted show the work in progress.

23. The Board's process in dealing with jurisdictional disputes is designed to eliminate lengthy proceedings involving *viva voce* evidence. The written submissions on behalf of the particular work in dispute by the Labourers and United Floor were complete and very detailed (including Mr. Silvestri's declaration.) A construction panel of the Board with many years of experience in the construction industry unanimously decided after reviewing and accepting all of the detailed and extensive filings what the particular work in dispute is and the relevant practice in the context of this particular situation. There was no additional *viva voce* evidence required to clarify the written documentations. The panel understood the positions of the parties.

24. The Board does not agree with the Labourers and United Floor's position that installation of bulkheads for what is described as "superflat" floors should be regarded differently than installation of bulkheads on floors other than superflat floors that have a rating of less than "F40". The applicant does not claim work in connection with the installations of bulkheads on other than superflat floors as defined in Mr. Silvestri's declaration.

25. The work was subcontracted by RYCO the General Contractor who has collective agreements with both the Carpenters and the Labourers. The Carpenters filed a section 126 grievance alleging violation of their subcontract clause. The fact that RYCO subcontracted the work to United Floor as a practical matter means that RYCO made an assignment to the Labourers.

26. Having regard to the above and pursuant to the provisions of section 93 of the Act and the Rules for jurisdictional disputes the request for reconsideration is denied.

27. Board Member MacDonald participated fully in the decision making process and approved the above decision prior to his death.

1356-94-R Pamela Blais, Applicant v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Responding Party v. Katalin Lanczi Pharmacy Ltd. c.o.b. as **Shoppers Drug Mart**, Intervenor

Collective Agreement - Termination - Timeliness - Union alleging that termination application untimely because collective agreement in effect - Employer submitting that no collective agreement in effect and that, as result of union striking, offer it had made no longer outstanding for union to accept - Board determining that collective agreement in effect and that application untimely - Application to terminate bargaining rights dismissed

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

APPEARANCES: *Pamela Blais*, *Cynthia Whiston*, *Heather May*, *Dorthey Smith* and *Gena Graziotto* for Pamela Blais; *David W. T. Matheson*, *Jeffrey Andrew*, *Ab Player*, *Rob Low* and *Thomas Collins* for Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000 and 1688; *A.D.G. Purdy*, *Katalin Lanczi* and *Susan Nicholas* for Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart.

DECISION OF THE BOARD; October 6, 1994

1. This is an application for termination of bargaining rights. By a decision dated August 17, 1994, the Board dismissed this application as we had determined that since a collective agreement was in effect on the date of application, the application for termination of bargaining rights was untimely. These are the reasons for that decision.
2. On July 12, 1994, Pamela Blais applied, pursuant to section 58 of the Act, to the Board for termination of the bargaining rights of the Retail Wholesale Canada, Canadian Service Sector, Division of the United Steel Workers of America et al (hereinafter referred to as the "union"). The union had been certified on June 1, 1993, as the bargaining agent for a group of employees employed at Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart (hereinafter referred to as the "employer") in Guelph, Ontario. Ms. Blais believed the union and the intervenor had not reached a collective agreement and that one year had elapsed since certification.
3. In its response to the termination application, the union alleged that the application was untimely, as the employer and the union were bound by their first collective agreement, signed on July 5, 1994, for a term of two years. Since the presence of a collective agreement would render the termination application untimely, the Board decided to deal with this preliminary matter.
4. The union called three witnesses in support of its position. The employer and Ms. Blais called no evidence. In coming to its findings of fact the Board has carefully considered all of the oral and documentary evidence before it, the submissions of counsel, and the usual factors germane to assessing evidentiary credibility and reliability. The Board has also assessed what is most probable in the circumstances of the case, and has considered the inferences which may reasonably be drawn from the totality of the evidence. It is noteworthy at the outset that there was little dispute on the facts, although the union and the employer differed on the conclusions the Board should draw from the factual circumstances of this case.
5. The relevant sections of the Act for the purposes of the termination application are as follows:

1.- (1) In this Act,

• • •

“collective agreement” means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees, and includes a provincial agreement;

• • •

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

• • •

58.- (1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

• • •

62.- (1) Subject to subsection (3), where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made until,

- (a) thirty days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator;
- (b) thirty days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board; or
- (c) six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled,

as the case may be.

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Facts

6. It is common ground between the parties that Ms. Blais has made two previous applications for termination of the bargaining rights of this union. Her first application was made on May 11, 1994, (Board File No. 0273-94-R) and was withdrawn by leave of the Board on June 9, 1994. The second application (Board File No. 1200-94-R) was filed on July 6, 1994, and was withdrawn on July 19, 1994. The present application was filed on July 12, 1994.

7. The union’s main witness was Ab Player, a national representative and area director for the union in the London vicinity. Mr. Player was involved in bargaining with this employer from early 1994 on. In the course of bargaining Mr. Player dealt with Mr. Purdy, counsel for the employer, and Katalin Lanczi, the owner of the business. By early April 1994 the parties had

resolved most of the collective agreement language issues and had begun to discuss monetary items. The union applied for the appointment of a conciliation officer following the parties' April 8, 1994, meeting. Mr. Player thereafter reduced all of the agreed matters into a draft collective agreement format and sent a copy to Mr. Purdy for review. Mr. Purdy found a correction he wanted made and Mr. Player made the correction.

8. When the union and employer met with the conciliation officer on May 20, 1994, they worked from the draft collective agreement prepared by Mr. Player. At that meeting the parties agreed on a letter of understanding with respect to the removal of disciplinary letters from employee files. On the issue of wages, the employer tabled a written document outlining wage rates for all classifications for a two-year period. From the evidence it was not clear whether the document was given to Mr. Player directly by Mr. Purdy or by the conciliation officer, but it was uncontested that the document had Mr. Purdy's handwritten notes which included a notation which said "Amended wage rates given to Concil. Off. at 1.00 May 20/94". The text of the document, as outlined below, indicates the wage offer was for two years:

All employees who are presently receiving wages greater than the 24 month or 4000 hours rate, as the case may be, will receive an increase of two per cent (2%) per hour on the date of ratification and an additional two per cent (2%) per hour one (1) year from the date of ratification.

The parties agreed at that juncture that the collective agreement would have a two-year term. There were no other issues outstanding between the parties and Mr. Player informed the employer he would take the offer to the bargaining unit, without a recommendation to ratify, and he would inform the employer of the result.

9. A ratification meeting was held on May 29, 1994, at which time the offer was rejected. Mr. Player informed Mr. Purdy of the result and suggested the parties should seek mediation.

10. On June 28, 1994 the parties met with a mediator. During the discussions one of Ms. Blais' earlier termination applications was mentioned. Mr. Purdy suggested that a one-year collective agreement, back-dated, may be considered but the union showed no interest. No formal proposal for a one-year agreement was tabled. By the end of the session the union had been told that the May 20th. offer was the only one on the table and would not be altered.

11. The union called another ratification meeting for July 3, 1994, and put the same employer offer to a vote again. The offer was again rejected. Since the union had been in a legal strike position since June 25, 1994, the union informed the membership that a strike would commence at 9:00 a.m. on July 4. Mr. Player did not communicate the outcome of this vote to the employer, nor did he inform the employer that a strike would begin the next day.

12. On July 4, 1994, Robert Low, a staff representative from the London office of the union who was responsible for this bargaining unit, set up a picket line at 8:55 a.m. outside the employer's Shoppers Drug Mart location. Three employees from the bargaining unit, Mr. Low, and another staff representative of the union picketed with placards indicating there was a strike on. Mr. Purdy, Mr. and Mrs. Lanczi were at the store that morning. All bargaining unit staff scheduled to work that day were either at work already before the picket line was set up, or attended at work later. The picket was removed at around noon. On the following day, July 5, the picket line was set up from 8:00 a.m. to noon, with the same composition of people. Again, all bargaining unit members scheduled to work that day crossed the picket line and went to work.

13. Tom Collins, the Canadian Director for the union, wrote a letter to Mr. Purdy on July 5, 1994, which letter was sent by facsimile and courier. In the letter he indicated that in view of the

circumstances at Shoppers Drug Mart, the union was accepting and ratifying the employer's last offer. Mr. Collins outlined that he had the constitutional authority to take this action. The letter sent by courier also included six copies of the collective agreement, each signed by the union.

14. Mr. Collins is ultimately responsible for all bargaining of collective agreements in Canada and had been kept apprised of the situation in this case. He has been on the full-time staff of the present union and its predecessor, the RWDSU, for eighteen years. In that time he has been an International Representative and Vice President of the union. More recently he was the Canadian Director of the RWDSU, before assuming his current position. Mr. Collins was concerned that the situation with Shoppers Drug Mart appeared to be developing into one where the union could not get a better contract and could not stage a successful strike. With no strong strike mandate, he believed the union was being put in an impossible bargaining position. The employer had refused to change its offer between the first and second ratification vote, and Mr. Collins knew there had been one untimely termination application filed already. Mr. Collins had advised Mr. Player to have the unit go out on strike to see if the employees would support the strike and thereby to gauge the support for further bargaining. However, after he heard the reports from the picket line on July 4, 1994, and understood the lack of bargaining unit support for a strike, he discussed the situation with the local union and decided to ratify and sign the collective agreement. Mr. Collins had Mr. Player draw up the collective agreement for his signature, signed six copies, and sent them to the employer's counsel.

15. Mr. Player used the document the parties had worked from on May 20, 1994, added the letter of understanding regarding disciplinary letters which the parties had agreed upon, made the employer's final wage offer Schedule "A" of the collective agreement, and inserted the dates for the term of the collective agreement in the "Duration of the Agreement" clause so that the agreement would run from July 5, 1994, the date of ratification by the union, to July 4, 1996, two years hence.

16. Since July 5, 1994, neither Mr. Collins nor any one else in the union has heard from Mr. Purdy or the employer. No signed collective agreement was returned to the union. The union's legal counsel wrote to Mr. Purdy, enclosing the part of the union constitution which empowers Mr. Collins to ratify the agreement on behalf of the bargaining unit, but it too has received no response.

17. The relevant sections of the union constitution state as follows:

ARTICLE VI - NATIONAL OFFICERS

CANADIAN DIRECTOR

SECTION 5

(a) The Canadian Director shall be the chief executive officer of the National Union and shall coordinate and administer the affairs of the Union in all of its phases, subject to the approval of the National Executive Board and the Convention. The Canadian Director's decision shall be binding unless reversed by the Executive Board or Convention.

• • •

ARTICLE XVIII - COLLECTIVE BARGAINING

SECTION 2

The right to bargain collectively for the whole membership of a local union shall lie with the

Executive Board of the local union or officers designated by it and with the National Union or its Representative when the local union so requests.

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SECTION 4

The result of negotiations and the agreement shall be subject to ratification by the local union or by the members affected thereby. If a majority of those voting ratify the results of the negotiations, except as provided in Article XIX, the contract shall be drafted and signed by proper officers of the local union and thereupon it shall be binding upon all members. Except that, *the Canadian Director in specific instances, may act for the members and officers of the local union, including but not limited to the right to sign a contract without a ratification vote.* ... (emphasis added)

Arguments

18. The union made three arguments in support of its position that the Board should find there was a collective agreement in effect by the date of application for termination of bargaining rights. The union's first position was that when Tom Collins, the Canadian Director of the union, executed a copy of the document which the employer and the union had been working with in bargaining, and which the union contends embodied the employer's last offer, then a collective agreement was in effect. The second position is that the employer, by not executing the collective agreement has committed an unfair labour practice and has breached section 15 of the Act, the remedy for which should be that the Board finds a collective agreement was in effect from the date Mr. Collins signed the document referred to above. The union's alternate position is that since the employer refused to negotiate for a first collective agreement while the predecessor union, the Retail, Wholesale and Department Store Union, and the present union determined who held bargaining rights for this unit of employees, and since as a result one year elapsed without the parties reaching a collective agreement, therefore the employer should not be allowed to benefit from its refusal to bargain and the time for negotiating a first agreement should be extended by the amount of time lost in determining who legitimately held bargaining rights. The union therefore argues that the open period should be extended.

19. Having found that a collective agreement was in existence between the parties prior to the application for termination (reasons for which are outlined below), we do not intend to address the union's novel argument regarding an extension of the period to bargain.

20. The employer argued that since the company's last offer had been rejected by the membership of the bargaining unit on two occasions, there was no offer outstanding for the union to accept. Further, it was argued that after the last ratification meeting the union struck, without any notification to the employer, so the employer understood there was no acceptance of its last offer. Counsel for the employer acknowledged in his opening statement receipt of Mr. Collins' letter of ratification and of six signed copies of a document purporting to be a collective agreement, but since he had not reviewed it after taking receipt, and since his client had not signed the document, he argued there was no collective agreement in effect on the date of application for termination of bargaining rights. As was noted earlier, the employer called no evidence in support of its position.

21. Ms. Blais argued that the application was timely as she had applied thirty days after the "no board" report had been issued by the Minister of Labour.

Decision

22. The employer in this case argued that as a result of the union striking, the offer it had made was no longer outstanding for the union to accept. We propose to address this issue first.

23. In *The Toronto Jewellery Manufacturers' Association*, [1979] OLRB Rep. July 719, the employer made an offer for renewal of a collective agreement at a meeting with the union in January 1979. At that juncture the union made a counter-offer. Nonetheless, the employer reduced its offer to writing and sent it to the union in February, 1979. The employer thereafter notified the union in March, 1979, that it was making no further proposals. The union took the bargaining unit out on strike between early and the middle of April, and then on May 8, 1979, advised the employer that it was ratifying and accepting the employer's last February offer. When the employer then refused to sign a collective agreement, the union argued that the employer's last offer, its March notification, and the union's acceptance of the employer offer, constituted a collective agreement. The question considered by the Board in that case was whether the offer was still outstanding for the union to accept in May 1979, and the Board stated as follows:

8. Collective bargaining is a dynamic process and it is also one to which the parties apply their relative bargaining strengths in an attempt to gain from each other concessions and compromises which eventually produce a collective agreement. There is an implied expectation in the give and take of collective bargaining that concession and compromise will result in agreement without the exercise of economic sanction. In fact, it is not uncommon for either party to make this an explicit condition attached to tentative agreement on any or all items so that, if there is either a lockout or strike, all issues are "back on the table". There is no evidence in our case that such a condition was attached to the Association's last offer and the evidence is that it did not subsequently withdraw its offer. The Board, therefore, must consider what effect, if any, the passage of time and the intervening events have had on the status of the offer.

24. The Board in that case found that since the employees had been on strike for three weeks before the union tried to accept the employer's February offer, the employer's last offer had by then been extinguished by the passage of time and the intervening event of the strike.

25. In *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136, the employer made a final offer to the union, which was rejected and the employees went on strike for over six months. More than five months into the strike the employer informed the union that due to its business deteriorating as a result of the strike, it was withdrawing its earlier proposal. Nonetheless, approximately two weeks later, and six months into the strike, the union said it was accepting the employer's pre-strike offer. When the employer refused to endorse such an agreement, the union complained to the Board that the employer was acting in bad faith. The Board found that if the financial condition of a company deteriorates after it has made a monetary offer in collective bargaining, but before the union has accepted that offer, then the employer may have cause to reconsider its offer and it should communicate its revised position to the union at the earliest possible date. In that case as the employer did not inform the union of its changed position until five and a half months into the strike, and the employer altered its bargaining position dramatically, the Board found a section 15 violation. In *Radio Shack*, [1985] OLRB Rep. June 901, the union struck for almost six months before informing the employer it was accepting the employer's last offer made just prior to the commencement of the strike. The employer immediately indicated to the union that there was no contract reached between them as a result of the union's acceptance. The Board adopted the reasoning in *Toronto Jewellery Manufacturers' Association*, supra, and found that the employer's offer had been extinguished by the passage of time and the intervening lengthy strike, and found that the employer had not violated section 15.

26. The short passage of time between the employer's last offer and the union's acceptance,

and the very short duration of the strike in the case before us distinguishes this case from the cases cited above. The facts in the case before us are that the responding party met with the union and reiterated its offer on June 28, 1994; the union held a ratification vote on July 3, 1994, at which time the bargaining unit rejected the offer; a strike commenced on July 4; and on July 5 the union, pursuant to its own constitutional powers, accepted and ratified the employer's last offer. The union accepted the employer offer within one week of its being made. The employer had not withdrawn its offer in the interim, and subsequently never indicated to the union that it had changed its position, and the employer did not argue that its financial circumstances had changed substantially in the intervening time. We note that none of the employees scheduled to work on either of the two days of the strike withheld their services, and the picket line was only present for a maximum of four hours on each of the two days. We therefore find that the employer's last offer was outstanding at the time that Mr. Collins wrote his letter ratifying that offer.

27. The employer also argued that since the bargaining unit had failed to vote in favour of acceptance of the employer offer, that the offer therefore lapsed and that there was consequently no collective agreement. The Board indicated in *Nortec Air Conditioning Industries Ltd.*, [1988] 88 CLLC 14,178, that this is not a viable argument for an employer to make, as stated in the following excerpt from that decision:

16. The Board has noted previously that the insistence on ratification by employees on the part of an employer reflects a failure to recognize the union as the body with the exclusive authority to make a collective agreement. As the Board observed in *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337, a union is not merely an agent of employees:

18. Under *The Labour Relations Act* an employer makes his contract with the union and not with the employees. It is common to refer to a union as a "bargaining agent". A union is, however, much more than a mere agent when it comes to negotiating and administering a collective agreement. A union has an independent legal existence which the employer is bound to respect....

19. By refusing to accept the union's execution of the collective agreement and insisting on a ratification vote among all of the employees the respondent has in fact refused to recognize the union as the body with the exclusive authority to make a collective agreement. By this failure to recognize the union the employer has violated the most fundamental aspect of its duty to bargain in good faith set out in section 14 [now 15] of the Act. (*De Vilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49)

28. We respectfully agree with the analysis and conclusion of the Board in *Nortec Air Conditioning, supra*. The union is the exclusive bargaining agent for the employees of Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart. Had the employer wished to withdraw its offer it would have had to explicitly do so by communicating with the union. On the evidence before us we find there was no explicit, or indeed implicit, withdrawal of the employer's last offer, and therefore find that the offer was extant for the union to ratify. There is no requirement in the Act for ratification of a collective agreement by employees and the employer cannot insist upon such ratification before it will sign an agreement.

29. On the evidence before us, we find that Mr. Collins properly ratified the collective agreement on behalf of the union on July 5, 1994.

30. In deciding whether there is a collective agreement between the parties the Board and arbitrators have considered the central question to be whether the parties had completed their negotiations and settled all matters in dispute between them. While a memorandum of agreement bearing the signatures of both parties is the best evidence of agreement having been reached, the labour relations reality is that such a signed document may not always exist. The Board and arbi-

trators have found collective agreements to exist even in the absence of a signed memorandum of agreement. In deciding whether a collective agreement has been reached consideration is given to whether negotiations have ended, the parties have decided all matters, and have reached agreement, and considering the particular circumstances of each case.

31. The definition of a "collective agreement" in the *Labour Relations Act* requires that it be a document in writing between the employer and the trade union, and that it contain provisions respecting terms and conditions of employment and the rights and privileges of those affected by the document. There is no statutory requirement that the collective agreement be signed by both the union and the employer.

32. In *Sears Canada Inc.*, [1986] OLRB Rep. Aug. 1159, the Board considered whether there was a collective agreement in effect when an application for termination of bargaining rights was filed. The trade union and employer had reached a memorandum of agreement but had not executed a collective agreement by the termination application date because there were some mistakes in the draft agreement. The employer had not indicated any concerns about the existence of the collective agreement until after it received notice of the application for termination of bargaining rights. The Board, in reaching its decision finding that there was a collective agreement between the parties in that case, adopted the analysis in *Re Canteen of Canada Ltd. and Retail, Wholesale and Department Store Union, Local 414* (1984), 15 L.A.C. (3d) 305 and stated as follows:

9. The question then, is whether the circumstances here establish the existence of a collective agreement which both binds the bargaining parties and precludes the present application. This is not a novel problem. Although the *Labour Relations Act* requires that a collective agreement be in writing, so that oral undertakings may not be enforceable, this Board and boards of arbitration have frequently been required to determine whether or when a collective agreement has come into effect. One of the most recent cases is *Re Canteen of Canada Ltd. and Retail, Wholesale and Department Store Union, Local 414* (1984), 15 L.A.C. (3d) 305, where Arbitrator M. G. Mitchnick reviewed the practical and policy considerations which, in his view, should bear upon the issue. His analysis is based, in large measure, on an earlier decision of this Board, and is set out in a long passage to which we might usefully refer:

Labour and arbitration boards have long held that the existence of a collective agreement is not dependent upon the execution of a formal document, which traditionally occurs a good deal later than the successful conclusion of negotiations. Because of what rides on it in terms of the tabling of new positions or resort to economic sanctions, what tribunals have always required is a certainty that the bargaining has been brought to an end, as well as sufficient documentation of the settlement that its precise terms can be identified and interpreted by a third party, if necessary. As the Ontario Labour Relations Board stated in *U.E.W. v. Marsland Engineering Ltd.*, [1970] O.L.R.B. Rep. 133 (O'Shea) at p. 138, para. 13 for example:

...until such time as the parties complete their negotiations by resolving all outstanding issues and bring their bargaining to an end, it cannot be said that a collective agreement has been consummated.

The important thing is that the parties know when their negotiations are complete, and the simplest indication for an adjudicator that that has occurred is a clear statement to that effect signed by each of the parties. Experience has shown, however, that negotiations are not always concluded in quite such a model form, and labour tribunals have had to take care to respond to the realities of how collective bargaining takes place. This is the thrust of the remarks of the Ontario Labour Relations Board once again, for example, in *Graphic Arts Int'l Union, Local 12-L v. Graphic Centre (Ontario) Inc.*, 76 C.L.L.C. para. 16,041, [1976] O.L.R.B. Rep. 221 (Burkett).

The collective agreement is the cornerstone of our labour relations system. It evidences the existence of bargaining rights and other than during a stipulated period serves as a bar to either the termination or transfer of these rights. It evidences a bargain struck between the parties as to term and conditions of employment for a term specific and requires that any dispute as to its interpretation, application or administration be resolved by binding arbitration. Its existence or lack thereof can be determinative of the legality or illegality of certain activities engaged in by an employer, a trade union or by employees. The Board in lending an interpretation to section 1(1)(e) has been influenced by both the realities of the collective bargaining process and by the practical need for consistent and easily understood criteria. The parties to collective bargaining do not normally execute a formal document until some time after the bargaining process has been completed. The process is one wherein the agreement of the parties is reduced to a memorandum of settlement subject to ratification by the respective principals which is then followed by the drafting and execution of the formal document. It would not be sound industrial relations policy to require as a condition of entering into a collective agreement the execution of the formal document thereby precipitating an often prolonged extension of the open period. The parties, however, must know, with a high degree of certainty and predictability, precisely when they have entered into a collective agreement so as they may properly assume their respective duties and responsibilities and conduct themselves in a manner consistent with the existence of a subsisting collective agreement.

Normally, the last step in the collective bargaining process is employee ratification, and tribunals have initially held that this pre-condition of a settlement must be evidenced in writing before a collective agreement can be said to have been unequivocally achieved. But that requirement quickly led to results that were unrealistic and unwarranted, and room had to be made for a more flexible approach, although carefully reserved for appropriate cases. The *Graphic Centre* case, once again, expanded on this point as follows [pp. 616-7 C.L.L.C.]:

13. In a number of cases the Board has been faced with situations where the parties have signed a memorandum of settlement subsequent to which confusion has arisen as to whether ratification has occurred. In certain of these situations the Board has responded to the extrinsic evidence and drawn the inference that ratification has occurred without their being signed evidence of this fact. (See *Versa Services Limited* case [1972] OLRB Rep. Apr. 306, *Service Employees Union Local 210* case *supra*, *Field-Price Limited* case [1973] OLRB Rep. Oct. 543). In other similar situations however the Board has stated that the parties must signify their ratification of the memorandum in writing (see *Marsland Engineering Limited* case *supra*, *Civil Service Association of Ontario* case [1971] OLRB Rep. Sept. 596) in order for there to be a collective agreement within the meaning of the Act. Although each case must be considered within its own circumstances a signed memorandum of settlement coupled with *compelling* evidence of ratification must be considered by the Board as evidence of a collective agreement within the meaning of the Act. Whereas a Memorandum of Understanding subject to ratification is not a collective agreement (see *John Inglis Co. Ltd.* case [1974] 1 Can. LRBR 481 (B.C.)), evidence which clearly establishes that ratification has occurred elevates the memorandum to the status of a collective agreement within the meaning of the Act. Ratification satisfies the condition precedent thereby giving rise to what is then an unconditional agreement in writing (i.e. signed by the parties) on all outstanding matters. Although signed evidence of ratification is perhaps the most satisfactory evidence in this regard, the Board cannot ignore other evidence which supports the singular inference that ratification has occurred. It should be added that if the Board were to require signed evidence of ratification in all cases it would be denying the parties use of the equitable doctrine of estoppel in those situations where there is evidence of

ratification, other than signed notification which has been relied upon by one or the other of the parties). (See *Garden City Laundry Limited* case [1970] OLRB Rep. May 240).

I can see no logical reason for rejecting this kind of commonsense approach when what is at issue is not employee ratification but, for example, whether the company, for its part, has unequivocally signified its acceptance of the written terms of settlement. It seems to me that so-called expert labour tribunals inexcusably fail to serve their constituency if they cannot have regard to that kind of reality. This seems particularly so when one considers that the courts, in dealing with the Statute of Frauds, which, as union counsel points out, was passed for the *sole purpose* of requiring certain types of agreements to be in writing, soon developed a principle of finding the contract to exist where "signed writing was lacking but other convincing proof was present": *Cheshire and Fifoot's Law of Contract* 8th ed. (1972) p. 142.

It seems to me that that is precisely what was being done in the labour board's *Versaservices Ltd. v. Canadian Union of General Employees* [1972] O.L.R.B. Rep. 306, (Shime), cited to me by the union. There the company considered that negotiations had been concluded, and sent the union in the usual way unsigned collective agreements in draft for the union's perusal. The signature of the company's industrial relations officer was on the letter accompanying the documents, but no company signature was on the documents themselves, and the case was dealt with as one with an absence of company signature formally accepting the terms of settlement. The board wrote [p. 311]:

We are also of the opinion that the preparation of the collective agreement by Versaservices Limited in accordance with the terms of the Memorandum of Settlement and the forwarding of that collective agreement to the union for signature is sufficient indication in the circumstances of this case that the employer had accepted the terms of the collective agreement pursuant to paragraph 2 of the Memorandum of Settlement.

In *Canteen*, the arbitrator was prepared to find, on the evidence, that there was a collective agreement even though the written document put before him lacked the signature of a company representative. He concluded that signatures (or their absence) were an evidentiary issue not a matter required by section 1(1)(e), and he went on to observe:

In the present case, the proposed terms of settlement now relied upon by the union were the terms proposed by the company itself. They were handed across the bargaining table and were clearly stated to represent the basis on which the company was prepared to settle the contract. The only question left open for the parties at that point was whether the employees would accept it. The employees did in fact accept and the company received from the union unequivocal confirmation in writing that that was the case. All of the terms of settlement had been set out in the document which the company had tabled on February 17th, and nothing remained to be done except formal execution of the so-called "long form" of collective agreement.

Can it really be said that the parties would be in a different legal position today if the company representative, in handling the final offer across the table on February 17th, either directly or through the mediator, had attached a letter signed by himself saying "attached is our final offer", or had happened to scrawl his signature or initials at the bottom of the final offer document itself? I think not. The parties knew that they had a deal on February 28th, when the union advised that the offer was accepted, and they know that they have a deal today.... I am satisfied that there presently exists between the parties a collective agreement within the meaning of s. 1(1)(e) of the *Labour Relations Act*. I would only add, to keep the issue in perspective, that I would have come to the same conclusion had the *union*,

subsequent to February 28th, become disenchanted and led the employees out on strike, and had the issue before me then been the lawfulness of that strike.

33. As the Board did in *Sears Canada, supra*, we too agree with Arbitrator Mitchnick's approach in *Re Canteen of Canada Ltd., supra*. In the case before us, as in *Re Canteen of Canada Ltd.*, the union is seeking to rely upon terms proposed by the employer and offered to the union as the employer's last offer. It is noteworthy that the package taken to the bargaining unit for ratification the second time was the very same one taken on the first occasion. The employer could not have argued, had the package been ratified in the first instance, that there was no agreement. It is in no different position following the second ratification vote, and subsequent to the union's letter of ratification. The employer never withdrew its offer. Once the union ratified the employer's last offer, and since there were no other outstanding issues between the parties, the parties had a collective agreement. We therefore find that as of July 5, 1994, the union and employer had reached a collective agreement.

34. Mr. Player indicated in his evidence that Mr. Purdy had raised the possibility of reaching an agreement for one year, but when the union did not show any interest in such a proposition, it appears not to have been pushed any further. There is no evidence of a one-year proposal being put on the table by the employer, and at the end of the mediation session on June 28, 1994, the union was left with the two-year wage proposal as the employer's final offer. We do not therefore find that the duration of the collective agreement was an outstanding issue. The employer's last wage offer, as outlined earlier, indicates the offer was operative from the date of ratification. Since the union ratified the agreement on July 5, 1994, and communicated its ratification to the employer that day, July 5, 1994, is the operative date for commencement of the two-year agreement.

35. One of the arguments advanced by employer counsel was that since Mr. Purdy did not have time to review the executed collective agreement sent to his office, and since the employer had not executed the agreement, therefore there was no collective agreement. Since we have found that the parties had reached a collective agreement on July 5, 1994, the employer's and its counsel's inaction following that date is irrelevant except to the extent that it connotes acceptance of the document tendered by the union as representing the agreement of the parties. Their inactivity does not vitiate the collective agreement.

36. The employer had, up to the date of the hearing, August 16, 1994, failed to execute the collective agreement. Having found that the union and the employer had reached a collective agreement on July 5, 1994, we find the employer has violated section 15 of the Act in its failure to sign the collective agreement.

37. Section 58(1) of the Act contemplates an application for the termination of bargaining rights in a situation where the trade union has not reached a collective agreement with the employer within one year after certification, and where the employer and union do not have a collective agreement by the date of application. In this case, the employer and the union had not reached a collective agreement within one year after certification. However, they did reach a collective agreement on July 5, 1994, and there was therefore a valid collective agreement between these two parties prior to the filing of the present application on July 12, 1994. For all of the reasons outlined above, this application was dismissed.

38. Since the Board decided this matter as outlined above, we did not hear evidence or consider whether the petition signed in support of Ms. Blais' application met the requirements of section 58(3) of the *Labour Relations Act*.

CONCURRING OPINION OF BOARD MEMBER R. W. PIRRIE; October 6, 1994

1. Based on the Board's jurisprudence concerning what constitutes a collective agreement, I concur with the above decision. The consequences of the decision are however to: a) require the employees to work under the terms of a collective agreement which they twice overwhelmingly rejected and b) to thwart their desire to have the Board hear their application to terminate the union's bargaining rights.

2. While one can appreciate the policy reasons which lie behind the Board's jurisprudence, I find it troubling to be a party to a process which disregards the wishes of the individuals most directly involved in this dispute.

0583-94-U Surex Community Services, Employer v. Ontario Public Service Employees Union and its Local 5102, Trade Union

Hospital Labour Disputes Arbitration Act - Reference - Employees of organization providing services to adults with developmental handicaps found to be "hospital employees" within meaning of Hospital Labour Disputes Arbitration Act

BEFORE: *Gail Misra*, Vice-Chair.

APPEARANCES: *J. Roffey, G. Anand, C. Hamilton and M. Bell* for the employer; *Ian Roland and Lilly Harmer* for the trade union.

DECISION OF THE BOARD; October 28, 1994

1. This is a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (also referred to hereafter as "HLDAA"). The question which has been referred to the Board for its advice is the following:

Are the employees of Surex Community Services "hospital employees" within the meaning of the *Hospital Labour Disputes Arbitration Act*?

2. The parties filed submissions with the Board and requested that a hearing be held. Three days of hearing were held on July 19, 20, and 21, 1994. Three witnesses were called by the employer, and two witnesses were called in response by the union. In addition to the written submissions filed, three exhibits were filed. In making the findings and reaching the conclusions set forth in this decision, the Board has considered all of the oral and documentary evidence, the submissions of counsel, and the usual factors germane to assessing evidentiary credibility, including the demeanour of the witnesses, the clarity of their evidence, and the witnesses' apparent ability to recall events and to resist the tug of self-interest in their responses to the questions. The Board has also assessed what is most reasonable and probable in all of the circumstances of this case, and has considered the inferences which may reasonably be drawn from the totality of the evidence.

3. For the reasons outlined below, it is our advice to the Minister that the employees of Surex Community Services are "hospital employees" within the meaning of the *Hospital Labour Disputes Arbitration Act*.

4. The relevant sections of the *Hospital Labour Disputes Arbitration Act* are as follows:

1. (1) In this Act,

“hospital” means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged;

• • •

“hospital employee” means a person employed in the operation of a hospital;

• • •

3. (1) Where a conciliation officer appointed under section 16 of the *Labour Relations Act* is unable to effect a collective agreement within the time allowed under section 18 of that Act, the Minister shall forthwith by notice in writing inform each of the parties that the conciliation officer has been unable to effect a collective agreement, and sections 17 and 19 of the *Labour Relations Act* shall not apply. R.S.O. 1990, c. H.14, s.3.

(2) The Minister may refer to the Ontario Labour Relations Board any question which in his or her opinion relates to the exercise of his or her power under subsection (1) and the Board shall report its decision on the question. 1992, c.21, s.62.

5. On April 22, 1994, the responding party (hereinafter also referred to as “OPSEU” or the “union”) requested the appointment of a conciliation officer and on May 3, 1994, the Minister appointed a conciliation officer to confer with the parties and to endeavour to effect a collective agreement. The applicant (hereinafter also referred to as “Surex” or the “employer”) requested that the Minister determine whether Surex Community Services falls within the jurisdiction of the HLDAA. What is unusual about this ministerial reference is that two years earlier, on June 29, 1992, the Minister of Labour had found Surex to be a “hospital” within the meaning of HLDAA and subsequent to that designation, the parties had reached a collective agreement. The term of that collective agreement expired on March 31, 1994, and it was when the parties were negotiating their second collective agreement that the employer requested that the Minister reconsider his previous decision.

Preliminary Objection

6. At the outset of the hearing the union made a preliminary objection to the Board’s jurisdiction to hear the matter as the union argued that the issue of “hospital” status was *res judicata*, or in the alternative, that the Minister, and therefore the Board, was *functus officio*.

7. In arguing that the issue was *res judicata*, the union stated that the Minister’s decision in the first instance was an administrative one, based on a statutory scheme. Therefore, the union argued, the question of the status of Surex had already been decided and could not be relitigated. The employer had judicially reviewed the Minister’s June 29, 1992, decision and had not been successful, yet the employer was now seeking to re-litigate what had been both decided and appealed. According to the union there were no new facts being put forward by Surex which could not have been made available to the Minister at the time of the original decision-making process. The union therefore argued that on the principles of *res judicata* the Minister could not reconsider the designation of Surex as a “hospital”, and if the Minister could not, then the Board, as the Minister’s delegate, could not hear this issue either. The union also argued that the Board ought to apply the

concept of issue estoppel. This concept prohibits a party to previous litigation from putting a concluded issue finally determined into contention again in a newly instituted proceeding before the same or a different tribunal which would also have the jurisdiction to adjudicate and determine that issue.

8. In making the argument that the Minister, and therefore the Board, is *functus officio*, the union outlined the circumstances in which an administrative tribunal may review matters. Those circumstances have been found by the courts to be very narrow. In the absence of some statutory power granting an administrative tribunal jurisdiction to re-hear a matter already heard and decided, that tribunal does not have such jurisdiction. In exercising its discretion to re-hear a matter already litigated and decided, consideration is given to whether there is new evidence available which was not available, or could not have been available by the exercise of due diligence.

9. Following the conclusion of the first day of hearing the Board issued an endorsement indicating that the union's preliminary objection was dismissed and that the hearing would continue. These are the reasons for that ruling.

10. As noted earlier, Surex applied to the Divisional Court for judicial review of the Minister's June 29, 1992, decision designating Surex as a then "hospital" within the meaning of that definition in HLDA. By an order of the Court dated December 1, 1993, the application for judicial review was quashed. The endorsement of Saunders J. is outlined below:

ENDORSEMENT

On motion by the respondent union, this application is quashed for reasons dictated.

Reasons

The Minister made a determination that the applicant was a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*. This meant that the parties were subject to that statute, rather than to the *Labour Relations Act*, in the determination of their respective rights.

A stay of the process was refused by this court. Under the process, a collective agreement was arrived at which expires in March of 1994. At the moment, there is no issue between the parties which can be assisted by the application. **When the agreement expires, the applicant is in the position to apply to the Minister for a determination of its status and can make such submissions, and submit such material, that it sees fit in support of its position that it is not a hospital under the Hospital Labour Dispute Arbitration Act.** The Minister then has the option of deciding the matter or referring it for a hearing by the Labour Relations Board. (emphasis added)

I would agree with counsel for the Minister that the current application, even if successful, would have no practical effect and, on that basis, the application should be quashed.

I might add that if I had reached a different conclusion, I would have struck out the affidavits referred to in the notice of motion of the union, in that while they may be relevant to the issue, they do not relate to the exercise by the Minister of his statutory power.

RELEASED: DEC - 2 1993

[signature]
"E. Saunders"

11. Surex acted on the Court's endorsement and upon expiration of the collective agreement requested that the Minister determine its status. The Minister, exercising discretion pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (and as outlined in the Saunders, J. endorsement), referred the question outlined in paragraph 1 to the Labour Relations Board.

12. The Board's limited mandate in this case is to advise the Minister of what it believes the

answer to the question referred by the Minister is. When the original determination of Surex's status was made the HLDA did not contain the section allowing for a ministerial reference, and the Board was therefore not involved in any way in the Minister's decision-making. The Board is still not the tribunal which will determine the status of Surex employees, that being a decision which rests with the Minister.

13. In order for the Labour Relations Board to meet its mandate in this case it must consider the evidence and submissions of the parties and then must advise the Minister with respect to the question posed. The Board would be unable to answer the Minister's question and would be abdicating its duty if it decided for the Minister that she should not consider the Surex request. If the union wishes to argue before the Minister that *she* is *functus officio*, and that the question is issue estopped or *res judicata*, it is open to the union to do so. In the circumstances, I therefore found that *the Board* was not barred from hearing this matter on any of the grounds argued by the union.

The Facts

14. Surex Community Services is a charitable not-for-profit organization which provides services to adults with developmental handicaps in Metropolitan Toronto. The objects of the organization are as follows:

- to provide quality care, treatment and support to mentally handicapped persons;
- to promote the integration of mentally handicapped persons into the community;
- to promote public participation in the acceptance of mentally handicapped persons as part of the community;
- to enhance the growth and development of mentally handicapped persons in daily living; and,
- to promote the development of educational, employment and advocacy opportunities for mentally handicapped persons.

15. The organization is funded by the Ministry of Community and Social Services, which ministry has overall responsibility for the provision of services to persons with developmental handicaps in Ontario. In keeping with the government of Ontario's goal of de-institutionalization, Surex is one of the organizations assisting in integrating persons with developmental handicaps into the community. Surex operates seven residential homes and one apartment program for forty-one adults with developmental handicaps.

16. The history of Surex is that it grew out of a pilot project in 1980 to bring profoundly and severely handicapped individuals out of provincial institutions. From 1985 on Surex expanded its services dramatically, as more developmentally handicapped persons were de-institutionalized. The vast majority of Surex residents came to Surex after many years of having been in provincial institutions. Surex is designed to provide community living opportunities to persons with developmental handicaps, to integrate them into their communities, and to attempt to the extent possible, to normalize their lives.

17. Surex operates out of small residential homes in established neighbourhoods. Most of the residents have their own bedrooms, although approximately fourteen residents share a bedroom with one other resident. The Surex staff work with the families of the residents and the residents themselves to create individualized programs to enhance the personal growth of each resident and to assist each resident to reach his or her full potential. Surex provides its residents with food and shelter, and whatever other services they need to meet all of their needs. What distin-

guishes Surex from the institutions most of the residents came from is its size, integration into the neighbourhood, and the individualized treatment each resident gets. Since its inception in 1980 two residents of Surex have left the homes to live on their own. One of those two residents now lives in the Surex Warden Woods project. A brief outline of each of the residences follows.

18. The Hurndale Residence is a five-bedroom, two-storey detached home housing four male and four female residents. These residents need some assistance with hygiene or some verbal or gestural prompts to complete their hygiene or dressing. Residents can eat with minimal assistance, assist in preparation of meals, cleanup, laundry, shopping, and household chores. Some of the residents require substantial assistance in completing tasks, but the majority need minimal supervision. Medications are administered by Surex staff to some residents. All residents attend some day program.

19. The Hampton Residence is a four-bedroom, three-storey detached home housing four young adult males who have varying levels of disabilities. Staff assist these men with dressing, making beds, and toileting. Breakfast is prepared for the residents but they are capable of feeding themselves. All four residents attend the Surex day program, assist in laundry, meal preparation, setting the table, and after-meal clean up. Staff assist all residents with bathing. The four men have the potential for being aggressive and therefore have programs in place to assist them in controlling these behaviours. Surex has a Behaviour Therapist on staff who assists staff members in formulating programs for residents to modify errant behaviour.

20. The Manorwood Residence is a five-bedroom, split-level, detached home housing five female and two male residents between the ages of fifty-three years and seventy-one years. All of the residents of this house can dress and feed themselves, but they require supervision and assistance with cooking, laundry, and bathing. One of the residents can prepare her own breakfast on occasion. They are all given their medications by the Surex staff prior to attending the Day Programs. The residents assist in preparation of dinner, setting of the table, and clear up and drying of dishes. Residents assist in folding and putting away laundry. Some of the residents periodically become violent or self-injurious.

21. The Corinne Residence is a four-bedroom bungalow for three female residents and one male resident, all between the ages of forty-five years and sixty-four years. Three of the residents can look after their own hygiene and dressing while one needs staff assistance. They attend the day programs; participate in preparing, serving, and cleaning up at dinner time; and being high-functioning, these residents also assist in the household chores, menu-planning, and shopping. The fourth resident suffers from a progressive deterioration of her health, suspected to be as a result of having Alzheimer's disease, and so requires supervision, pureed food, and has medical and behavioural problems.

22. The Morrish Residence is a five-bedroom ranch-style, wheel-chair accessible house, for four males and one female between the ages of twenty-five years and forty-three years. The residents of this home are profoundly developmentally handicapped as well as being physically challenged and all are dependent on staff for some or most of their needs. Four of the five residents use wheelchairs or crawl. All require lifting and assistance in transfers. The Morrish residents require full assistance with all aspects of their personal hygiene, and some require full assistance with eating. They are all non-verbal or have a vocabulary of only a few words. They express themselves through vocalizations, actions, and facial expressions. Each has his or her own communication style which requires staff to do a significant amount of interpretation of what the resident wants or needs. Four of the five residents attend the day program and one resident, in the late

stages of Alzheimer's disease, remains at home with an attendant dedicated to serving only his needs.

23. The Military Trail Residence is a four-bedroom ranch-style, wheel-chair accessible home for three males and one female between twenty-three years and forty-four years. All residents require wheelchairs for mobility although two persons can crawl or walk with assistance when out of their wheel-chairs. All require lifting or assistance with transfers. The four residents also require full assistance with all aspects of personal hygiene and require varying degrees of assistance with all other tasks. None of the residents are verbal, but all communicate by using facial expressions, actions, or vocalizations in their individual styles. Staff are required to interpret client wishes having regard to the individual styles of communication. Three of the four residents require the administration of medications to control seizures.

24. Dentonia Residence is a large home housing two males and six females who range in age from twenty-four to twenty-seven years. Their functional scale is however between the ages of two and ten years of age and most of the residents are non-verbal so that the predominant mode of communication is gestural. Formal signing is not used much in this home. The residents exhibit periodic behavioural challenges, including aggressive and self-injurious behaviours. All of the residents require some verbal staff prompting to complete tasks; one person can toilet and bathe independently, and can do laundry, meal preparation, dishes, garbage collection, and grocery shopping with minimal verbal prompting; five residents can complete tasks with moderate verbal and gestural assistance; and, two residents can only participate in tasks minimally and require high levels of staff assistance. Meals are prepared by staff for all the residents, staff administer medications, and assist all residents with dressing. All of the residents attend some day program. Four of the eight must be woken up every night to be taken to the washroom.

25. The Warden Woods Apartments have one bachelor apartment in a seniors' building for a seventy-year-old man. This individual lives independently with intermittent support every week for shopping, banking, and social contact. He requires ten to fifteen hours of staff assistance each week.

26. In addition to the residential programs, Surex provides vocational and developmental day programs for twenty-eight of its residents and three non-residents who were referred by other agencies. The programs include a sensory stimulation program utilizing arts, crafts, and domestic activities; a vocational program where four adults, two of whom are Surex residents, do work for pay; a seniors' recreational and leisure program; and, a developmental program designed to develop communication skills through some vocational contracts, skills training, arts and crafts, and lunch preparation. Of the thirteen Surex residents who do not attend the day programs, three are retired and stay at home (two of whom need to be supervised by Surex staff); one resident attends adult day classes operated by the Toronto School Board; and three residents attend a day program operated by the Metropolitan Toronto Association for Community Living.

27. Surex employs one hundred and twenty-one employees to provide services to its forty-one residents. Of those involved in direct care or service with the residents are the 28 Primary Counsellors, 14 Overnight Counsellors, 2 Health Care Workers, and 57 Part-time and Relief Counsellors. All full-time counsellors are required to have pharmacology training in order to dispense medication, and must have first aid training certificates and non-violent crisis intervention training. Twenty-five Surex residents take psychotropic or anti-convulsant medication which is administered by Surex staff. Surex staff only administer medication which has been pre-authorized and prescribed by the resident's physician or psychiatrist.

28. The only admission criterion for the Surex residential program is that an individual must

be an adult with a developmental handicap. One of the goals of the organization is to provide individualized services and programs to meet the needs of each resident. The Surex "Mission Statement" includes that Surex will provide care, support and training to adults with developmental disabilities. "Care" is defined to include an individual's physical, emotional, and psychological well-being.

29. By way of summary, of the forty-one residents of Surex, eighteen need full assistance or a lot of assistance with the requirements of daily living, twenty-two residents need varying degrees of assistance, and only one resident needs very little assistance and essentially lives on his own in a building for seniors. Except for the Warden Woods resident, all other residents are accompanied by Surex staff when outside of their homes. The vast majority of the residents require that medications be administered. Medications appear to range from anti-convulsants and anti-psychotic medications to medications for individual medical conditions. Many of the residents require some form of assistance with bathing, dressing, toileting, and with going out into the general community. While some residents assist in the preparation of meals, it appears that most meal preparation is done by staff. Staff are required to chop or puree food for a large number of the residents to facilitate eating. Some residents can assist in some aspects of housekeeping (e.g., putting laundry into the washing machine, assisting in menu planning, assisting in grocery shopping, etc.), but it does not appear that the residents do household cleaning and maintenance of the homes they live in. Approximately half of the residents are non-verbal, most of whom do not have the ability to sign many words. These residents must communicate through gestures and facial motions which staff are required to interpret in order to assist the resident.

30. For the forty residents living in the group homes, Surex has forty-four full-time staff members and fifty-seven part-time and relief counsellors who provide direct care to the residents, suggesting a high ratio of staff to residents to provide the requisite services the residents of Surex need. The Primary Counsellor and the Part-time Counsellor job descriptions include the responsibility of assisting residents with the skills of daily living, meal preparation, being responsible for the clothing and personal needs of clients, administering and documenting medications, and basic home maintenance. Primary Counsellors are responsible for one or two residents. The Health Care Worker job description describes the basic function of this position as being to provide health care for all clients of the Surex program. There are only two Health Care Workers who work in the two homes which are wheelchair accessible. Their job includes the provision of assistance with bathing, feeding, changing, personal hygiene, positioning, and other health-related needs. Health Care Workers are also responsible for basic home maintenance and for administering and documenting medications provided to the residents. Overnight Counsellors assist the residents overnight and with morning routines. They too must carry out basic home maintenance, and must administer and document medications given to residents. In addition, they monitor, observe, and document sleep patterns of the residents and note any problems. In some instances they must get residents up at designated times during the night to ensure that residents go to the toilet. At two residences the Counsellor staff persons perform daily physiotherapy exercises with the residents. The counsellor staff tend to have a Developmental Service Worker Diploma from community colleges, or a degree in a related field. In addition, training is provided in first aid, pharmacology, and crisis prevention techniques. There is no training provided for sign language.

31. Surex employs some staff in a Driver/Handyman capacity to transport the residents to the day programs and to make minor repairs on the houses. Housekeepers maintain clean environments at the Surex homes through regular household cleaning and home maintenance. A Behaviour Therapist, a member of the management team, works with the counsellors when counsellors note a resident has behavioural problems. With the training and assistance of the Behaviour Therapist with the counsellor, a plan is developed to try to modify the problem behaviour. The training

is provided to the staff to ensure that there is consistency among staff in dealing with the resident and so that anyone on duty can monitor the resident's progress. At the time of the hearing only one resident was on an active behaviour program.

32. Surex called Dr. Joseph Jacobs as an expert in the areas of mental retardation and developmental handicaps. The union accepted Dr. Jacobs as an expert in these areas. Dr. Jacobs has for some time been the medical physician for the Rygiel Home, a home for developmentally handicapped individuals of various ages in the Hamilton area. In November 1989 the then Minister of Labour found that the Rygiel Home was not a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*. Not unlike Surex in its focus, Rygiel Home provides residential services and day programs to up to fifty persons with developmental handicaps. However, unlike Surex, it provides shelter in only two homes, each housing approximately thirty and twenty persons respectively. From Dr. Jacobs' evidence, which it is unnecessary to outline in detail here, it was obvious that the Rygiel residents were similar to the Surex residents in their conditions and needs. Dr. Jacobs had visited the Surex facilities on one occasion in December 1992 and had observed the Surex residents on that visit which took place between 9:00 a.m. and 5:00 or 6:00 p.m.

33. The main thrust of Dr. Jacobs' evidence was with respect to the concept of "mental retardation", a term he preferred to use in giving his testimony. He defined mental retardation as a significantly sub-average general intellectual functioning which is quantified by looking at the deficit in relation to a person's ability to meet standards expected of someone of their age and cultural group. Social skills and abilities, communication skills, daily living skills, personal independence, and self-sufficiency are evaluated to arrive at a functional definition of a person who is "retarded". Dr. Jacobs maintained that mental retardation is not an illness or disease, although some diseases, like cerebral palsy and epilepsy, may lead to retardation. Most cases of mental retardation are caused by pre-natal or peri-natal effects; viral, bacterial, or trauma factors; or due to genetic abnormalities. Dr. Jacobs does not believe that mental retardation is an "illness", but accepts that those afflicted are disabled to some degree. He agreed that the Surex residents may also have other illnesses in addition to their mental retardation which illnesses may in fact have contributed to their retardation. He was, however, sceptical about the medical diagnoses made with respect to the Surex residents but, based on his limited observation, was not in a position to say that they were incorrectly diagnosed.

34. Dr. Jacobs' evidence suggested that if the Rygiel Home had been found not to be a "hospital" under the HLDAA, then Surex could not be either. In addition, he testified that since developmental handicaps were not illnesses, services for persons with developmental handicaps should not be labelled as "hospitals" or treated as institutions.

35. Residents of Surex are developmentally handicapped, with residents ranging from mildly to profoundly developmentally handicapped. A review of the biographies of each of the forty residents indicated that eleven residents have epilepsy (eight of whom receive anti-convulsant drugs to control their seizures); two suffer from Alzheimer's Disease; four residents have Down's Syndrome; two are affected by Cerebral Palsy; and three residents have Scoliosis. In the area of mental illness, a total of sixteen of the residents require drugs for various psychiatric disorders so that their self-injurious or aggressive behaviours can be controlled. Of these residents, two are diagnosed as Schizophrenic, one suffers from Manic Depressive Disorder, and three have phobias. Dr. Jacobs did not review each resident's biography in his evidence, and did not indicate specifically which diagnoses he disagreed with.

36. Colin Hamilton, the Executive Director of Surex, gave evidence of what the employer could do in the event of a strike if Surex is found not to be covered by the HLDAA provisions. He

indicated some programming would be consolidated; families would be asked to house residents; managers would work in the homes to care for those who could not be placed elsewhere; and, using the replacement worker provisions of the *Labour Relations Act*, the employer would supplement its skeleton staff with replacement workers. It was his opinion that the safety of the residents would not be a concern, that their conditions would not deteriorate, and he believed residents would not face any problems from being surrounded by new faces in their homes.

37. Mr. Hamilton indicated that the reason Surex is seeking to have the HLDAA designation revoked is that it has a very negative impact on how Surex services are viewed. In his estimation it was a “retrogressive step for community living” to be designated as a hospital. However, Mr. Hamilton testified that there was no evidence of any negative impact on Surex or its residents since the designation in June 1992, and he indicated that the residents had continued to interact with the neighbourhood residents in the same way as they had before the designation.

38. Mr. Hamilton did not disagree that the residents’ disabilities were going to be with them for the rest of their lives. He also agreed that all of the residents need some assistance, with some needing significant amounts of assistance. There is 24-hour staffing of all of the homes, with between two and three staff people at each home on the weekends and at least one counsellor working at each residence overnight. During the day there are more staff present when the residents come home from the day programs and to assist throughout the evening. Mr. Hamilton indicated that even those residents who can perform some tasks of daily living need assistance with other tasks. Some residents, while ostensibly “able” to perform some tasks, are only able to do so because a counsellor assists with “hand over hand” assistance. This requires the counsellor to put his or her hand over that of the resident and guide the resident’s hand to do the task, as an example, to brush hair, or to clean teeth. Residents are not under constant observation, but Mr. Hamilton agreed that the counsellors have to “keep an eye on everyone and on what they are doing”. Due to the limited communication skills of most of the residents the counsellors have had to develop ways of communicating with each individual, recognizing their unique cues.

39. According to Mr. Hamilton, counsellors may rotate between residents but he was not sure how often that happened. The counsellors have an ongoing relationship with the resident for whom they are primarily responsible, and have relationships with the other residents in each home. The relationships are an important part of helping the residents grow and develop, but residents do adapt to turnovers in staff. Mr. Hamilton indicated that each home has a routine or structure which the residents are familiar with and it is his preference not to disrupt that routine.

40. Mr. Garry Pruden was called as a witness for the employer. Mr. Pruden is the Scarborough Regional Director for the Metropolitan Toronto Association for Community Living (also referred to as “MTACL”), and as such has responsibility for all pre-school, day, and support programs operated by MTACL in the Scarborough area. MTACL provides support and services to persons with developmental handicaps from early childhood through to when persons are elderly. Approximately 1200 persons are employed by MTACL to provide its services and most are unionized. MTACL is however not governed by the *Hospital Labour Disputes Arbitration Act* in its labour relations.

41. Mr. Pruden gave evidence of the effect of a strike in 1984 on the services he was involved with. At that time a residential program had recently been opened six weeks prior to the strike, housing four residents. There was also a day program for approximately 15 people. He chose to close the residence and placed two of the residents in their family homes and two went to the Shadow Lake Centre, a summer camp program which the two residents had been at previously and where they knew other residents.

42. The strike had an impact on the lives of everyone involved and changed the patterns of living for the residents. He indicated however that while there was some short-term impact on the residents of having the strike-induced dislocation, they suffered no long-term detrimental effects. He likened the strike to parents going on vacation and developmentally handicapped people having different care-givers while the parents were away.

43. The union called Darlene Mitrovica and Maurice Breau as its witnesses. Ms. Mitrovica has worked at Surex for about eight years. She has worked as an Overnight Awake Counsellor at Manorwood Residence for three years, at the Warden Woods program for approximately three years, and is presently employed at the Corinne Residence as an Overnight Asleep Counsellor.

44. As an Overnight Asleep Counsellor Ms. Mitrovica works from 11:00 p.m. on and is permitted to sleep from midnight to 6:00 a.m.. However, due to her responsibilities for residents and the actions of disruptive residents she and the other Counsellor on duty during the night often remain awake. Her duties include ensuring that the house is safe, calling an ambulance or supervisor if necessary, being alert, watching the residents before they go to sleep to observe if they have any "behaviours", and, checking on residents if they have any problems during the night. Between 6:00 and 9:00 a.m. she assists in waking up all of the residents and ensures that they are properly dressed, groomed, and that they eat their breakfast. The residents do not cook at all during the week, so meals are prepared by the staff. In Ms. Mitrovica's experience, the residents of Corinne are not very capable of caring for themselves. One of the residents of Corinne requires a significant amount of care and is only able to eat pureed foods. She is believed to be suffering from Alzheimer's disease and her medical condition has been deteriorating for some time so that she has an increased incidence of seizures, she bangs her head, does not wish to remain clothed, and disrupts the other three residents of this home.

45. Ms. Mitrovica was working at MTACL during the 1984 strike, but had only been hired some months before the strike commenced. The Gladstone Group Home she was working in had to be closed down, but because the four residents of that home were quite aggressive they could not be placed in their own families and had to go to another group home for the duration of the strike. After the strike and when the residents and staff returned to Gladstone, it was Ms. Mitrovica's evidence that it took a long time to get the residents back on track as they were more aggressive and threatening, or alternatively, became withdrawn. One resident began to run away, only to return and break into the house later. In Ms. Mitrovica's experience the staff of these types of residences provide structure and consistency. The effect of the strike was to break all routines; programs designed to curb aberrant behaviours were not carried out with the individuals; and little documentation of resident behaviour was kept during the strike. The residents saw staff members they knew picketing outside the home they were moved to and could not understand why the staff would not come inside. Following the strike, staff had to rebuild trust with the residents, one of whom would cry every time he saw a staff member after the strike. In her estimation, the strike left the residents disoriented, their routines disrupted, and she believed it was a "gross injustice" to liken that period to a vacation. At MTACL the managers did all the work of the striking staff but those managers were not familiar with the residents or their routines. Nursing home staff were also employed through agencies, people with whom the residents were unfamiliar, to assist with resident care.

46. Maurice Breau, a Primary Counsellor at the Morrish Road Residence, gave evidence of his experience working for Surex for the past two years. He works a 3:00-11:00 p.m. shift except for the odd weekend day-shift. Morrish Road is a total care residence for five profoundly developmentally handicapped individuals, four of whom are in wheel chairs. Only one of the four individuals can feed himself and can walk. That individual has several behavioural problems including pull-

ing his own hair and that of others, or grabbing the throats of anyone within reach. He needs assistance to shower himself, brush his teeth, put on deodorant, wash his face, or comb his hair. Yet he needs less assistance than do the other residents of the home who require complete assistance, and cannot manage even the "hand over hand" assistance. The persons in wheelchairs require lifting in addition to all other care. None of the residents of Morrish Road can speak, so that all communication is by gestures, visual cues, or facial expression.

47. When Mr. Breau is on an evening shift, two other primary counsellors and a person on placement from the Social Service Employment Program are on shift with him to take care of the five residents. They prepare and puree supper before the residents return from their day programs, set out clothing for after the evening baths, and read the day's log to inform themselves of the residents' moods and behaviour that day. When the residents return to the home in a van, all four staff help to unload them from the van and get them inside. Residents are undressed once inside, checked to see if they are wet (all wear incontinence briefs), and are given options to indicate what they wish to do. At dinner the residents are fed by the counsellors. Following dinner their teeth are brushed, faces washed, and then the counsellors do the dinner cleanup. Thereafter, baths are given to the residents, and they are later put into bed. When enough staff are available, one or two residents are taken out in the evening to movies, malls, restaurants, or to other group homes for visits. On outings one counsellor is required for each resident and a driver is usually contracted to drive the van.

ARGUMENTS

48. Counsel for Surex made a four-pronged argument for the proposition that Surex Community Services is not a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*. She argued firstly that the essential characteristics of the services provided by Surex do not place Surex in the hospital services legislative scheme because Surex does not provide medical and nursing care or insured health services, and, it does not segregate patients from the community. Further, she argued that the meaning of "other institution" in the definition of "hospital" should be found by reference to the enumerated medical institutions in the Act. Surex is governed by legislation for developmentally handicapped persons, it is not operated for the "observation, care or treatment" of persons, but is more like a parent to developmentally handicapped persons, or like family members caring for an elderly family member in a home setting. It was argued that the degree of the residents' reliance on Surex services does not make Surex a hospital and that since the Rygiel Home had not been found to be a hospital, Surex should similarly not be found to be one. Counsel conceded that the Rygiel Home decision pre-dated the Divisional Court decision in *Dignicare Incorporated c.o.b. as Orleans Community Health Centre*, (Divisional Court, File No. 462/90, February 12, 1991, unreported), which the union is relying on.

49. Surex maintains that its residents are not "persons afflicted with or suffering from any physical or mental illness, disease or injury" and that to find that Surex is a hospital, the Board would have to find that the Surex residents are diseased, injured, or suffering from physical or mental illnesses. Counsel suggested the services provided by Surex are not medical, but supportive services. In addition, it was argued that Surex residents are not "chronically ill persons" and Surex is operated to provide community living, not to provide care or treatment to chronically ill persons.

50. The second aspect of the employer argument is that the policy of the provincial government is to encourage the de-institutionalization of developmentally handicapped persons and to foster their integration into the community at large. In 1974 the *Developmental Services Act* was passed shifting responsibility for services to people with developmental handicaps from the Ministry of Health to the Ministry of Community and Social Services (also referred to as MCSS). The

MCSS was mandated to phase down the large institutions housing persons with developmental handicaps, to provide more support services to assist children with developmental handicaps to remain in their families, and to develop community-based support in residential programs and vocational programs for developmentally handicapped adults. In furtherance of its goal, it is argued that the government has committed significant funds to facilitate de-institutionalization. Since Surex was founded in response to the government initiative to de-institutionalize persons with developmental handicaps, it was argued that it would therefore be contrary to the government's goal to find Surex to be a "hospital" or "other institution".

51. Surex's third argument is that by labelling Surex as a "hospital" or "other institution" the Board would be reviving the past and would do a disservice to the strides which have been made in integrating persons with developmental handicaps into the community.

52. Finally, Surex argued that if it was not subject to HLDAA, and a work stoppage ensued, no risk would be created for the residents of Surex. The employer asked the Board to reject Ms. Mitrovica's evidence of her experience of a strike in 1984 at the Metropolitan Toronto Association for Community Living as Ms. Mitrovica had only been employed with MTACL for six weeks before the strike commenced and was therefore not in a position to opine on the effects of the strike. In addition, Ms. Mitrovica had only had contact with a minor fraction of the total residents of MTACL. The employer asked the Board to prefer the evidence of Mr. Hamilton and Mr. Pruden on what the effect of a strike may be.

53. Counsel for Surex suggested that since the 1993 amendments to the *Labour Relations Act*, there is a framework in this Act to ensure that services are provided to persons with developmental handicaps in the event of a work stoppage. She argued that application of the replacement worker provisions in the Act would ensure that the well-being of residents of Surex would not be jeopardized so that it is unnecessary for the Board to interpret HLDAA so broadly as to include such services as Surex Community Services.

54. Counsel for the union argued that the facts in this case support a finding that Surex Community Services is a "hospital" as defined by the *Hospital Labour Disputes Arbitration Act*. According to the union only 20% of the residents of Surex are not receiving medications. Surex employs a Behaviour Therapist to prepare plans of treatment for the residents who experience behaviour problems. Surex staff perform physiotherapy on residents. All of the residents are chronically disabled and the vast majority require significant daily on-going care to function. The union pointed out that although Surex programs are aimed to improve the capabilities of its residents, all residents are nonetheless provided with some degree of basic care to function and most will never be able to live in the community on their own without the type of care, supervision, and safe environment that Surex provides.

55. The union relied on the Divisional Court's decision in *Dignicare Incorporated*, cited above, and argued that the Board has no discretion to decide not to apply that decision. It argued that in *Dignicare Incorporated* the Court has spoken about the meaning of the definition of "hospital" in HLDAA, and has found that the observation, care or treatment provided and referred to in that statute does not have to be of a medical nature. Therefore, the union postulated that the employer argument about legislation of a medical nature is irrelevant. In any event, the union suggested that the residents of Surex do suffer from physical and mental illnesses in addition to their developmental handicaps. The Court also dealt with the argument that direction about what institutions are to be covered by HLDAA is to be taken from the enumerated types of institutions in the Act, and it has rejected that suggestion, so the employer argument on that aspect is also irrelevant. The Court in that case adopted the position that the purpose of HLDAA is to ensure that

persons with physical or mental disabilities were not left without care in the event of a strike or lock-out, and that if residents' health and safety was dependent on the services offered by the place they resided, then their health and safety could be jeopardized by a strike or lock-out in that facility.

56. OPSEU argued that the difference between Surex and provincial institutions is the size because Surex has a series of small residential facilities instead of the large institutions which used to house most of the present residents of Surex. The residents of Surex share common areas like bathrooms, a kitchen, living areas, gardens and patios. Some residents also have to share a bedroom with another resident. The union pointed out that if one resident leaves, a new resident takes his or her place, in the same manner as in an institution. Regular and structured care and treatment are provided, and the residents' reliance on the services is substantial.

57. The union argued that the employer argument with respect to labelling of residents as being in a hospital or institution was without any evidentiary basis as Mr. Hamilton had testified that there had been no effect on Surex and the community's relations since June 1992 when Surex was first designated as a "hospital".

58. With respect to the Surex argument regarding the effect of a work stoppage, the union maintained that Surex was trivializing the services it provided and the level of care and relationship-building it fostered. The union argued that a strike or lock-out could harm residents emotionally, psychologically, and socially, in addition to the risk that the residents' basic needs may not be adequately met with reduced staffing. In any event, the union pointed out that the employer was in a worse position following the amendments to the *Labour Relations Act* because prior to the amendments it could have hired as many replacement workers as it wished. Following the amendments, it is limited in the pool from which it can draw replacement workers. Therefore, the union argues, the changes to this statute in no way change the way the Board should consider this matter.

DECISION

59. I cannot accept the employer's argument that since the Rygiel Home was not found to be a "hospital", therefore Surex too should not be designated as a "hospital". The Rygiel Home decision preceded the *Dignicare Incorporated* Divisional Court decision, cited above, and is therefore of little assistance to the Board in this case.

60. Since this case was argued before me, the Board has issued its decision in *Select Living (1991) Ltd.*, (August 29, 1994, Board File No. 1615-93-M, unreported) [now reported at [1994] OLRB Rep. Aug. 1082], wherein the Board was asked by ministerial reference whether a retirement home, Barclay House, was a hospital within the meaning of the *Hospital Labour Disputes Arbitration Act*. The Board advised the Minister that Barclay House was a hospital within the meaning of the HLDAA as it is a home for the aged. In relying on *Select Living*, I am not relying on the Board's factual findings in that case, but on some of the legal propositions addressed therein and argued before me.

61. The Board in *Select Living* relied in part on the *Dignicare Incorporated* decision, cited above, in reaching its conclusion and held that "observation" does not have to be of a medical nature to be covered by the definition in the HLDAA. The Board also rejected the employer argument that the replacement worker provisions in the 1993 amendments to the *Labour Relations Act* should influence the Board's interpretation of the definition of "hospital" in the HLDAA.

62. In *Dignicare Incorporated*, cited above, the residence in question housed individuals suffering from mental retardation, alcoholism, depression, and various psychiatric illnesses, and

provided residents with room and board, and personal care assistance. Two Ministers of Labour had determined that the residence was not a "hospital" within the meaning of the HLDAA because it did not provide "medical care or treatment", nor did it provide "care, observation or treatment of a medical nature". The union applied to the Divisional Court for judicial review of the ministerial decisions. The Court, in finding that the Ministers had been incorrect in their determination, stated as follows:

In light of the use of the words "observation, care or treatment" in the statute, the Ministers erred in determining that an institution would fall within the definition of "hospital" in the Act only if the care, observation or treatment provided by the institution was of a medical nature and only if the institution was similar in nature to a hospital, sanatorium, sanitarium, or nursing home.

Reliance is placed by the Applicant upon the decision of the then Minister, dated December 19, 1986, in *Re Bruce Retirement Villa and Service Employees Union, Local 210*:

"The purpose of the *Hospital Labour Disputes Arbitration Act* is to ensure that persons who are afflicted with physical or mental disabilities are not left without care in the event of a strike or lockout. Elderly residents who require some form of support assistance with the activities of daily living, are exactly the type of persons which the Act seeks to protect."

Further reliance was placed on the decision of the then Minister on October 25, 1984 in *Re Versa-Care of Hanover*:

"The Act is intended to protect those who may not adequately be able to protect themselves if services provided by the Lodge were unavailable. If the health and safety of residents is dependent on services offered by the Lodge, their health and safety could be jeopardized by a strike or lockout. In these circumstances, the HLDAA provides that employees cannot strike or be locked out. Instead, the parties must resolve their disputes by means of binding arbitration."

In our view, in light of the purpose of the Act the observational care provided by an institution to its residents need not be of a medical nature to bring the institution within the definition of "hospital" and within the scope of the Act. We would therefore allow the application.

63. Counsel for Surex argued that Surex residents are not persons "afflicted with or suffering from any physical or mental illness, disease or injury" and are not "chronically ill persons". The Shorter Oxford English Dictionary (Third Edition, Volume I) defines the words "illness", "disease", "injury", and "chronic" as follows:

Illness ... 3. Bad or unhealthy condition of the body (or, formerly, of a part); the condition of being ill (ILL a. 8); disease, ailment, sickness. ...

Disease ... 2. A condition of the body, or of some part or organ of the body, in which its functions are disturbed or deranged. ...

Injury ... 3. Hurt or loss caused to or sustained by a person or thing; harm, detriment, damage; an instance of this ME. ...

Chronic ... 2. ... Lasting a long time, lingering, inveterate; opp. to acute 1601. ...

64. From the evidence and submissions before me, it is clear that all of the residents of Surex suffer from some medical problem which has caused them to be developmentally handicapped. The residents suffer degrees of developmental handicap ranging from mild to profound. Those with more severe forms of developmental handicap need a great deal of care to manage the most basic tasks of daily living. Dr. Jacobs, in his evidence, agreed that to be developmentally delayed is a permanent condition of mental retardation. He, however, was of the view that one

should look to each individual's capability or potential rather than at his or her disability. One does not have to disagree with Dr. Jacobs' latter proposition to find that the residents of Surex have special needs because of their physically and mentally impaired conditions, needs which can only be met through the provision of specialized care, observation, and treatment.

65. In addition to their developmental handicaps, the majority of Surex residents also suffer from some other medical condition. Epilepsy, Scoliosis, Schizophrenia, Manic Depressive Disorder, Alzheimer's Disease, and various forms of mental illness are found among the resident population.

66. I am satisfied that on a purposive reading of the definition of "hospital" in the HLDA, and having regard to the dictionary definitions of "illness, disease or injury", the services provided by Surex fall within the "hospital" definition to the extent that Surex is an institution which is operated for the observation and care of persons who are afflicted with or suffer from physical and mental illnesses, diseases or injuries. This finding is not to be taken to suggest that a developmental handicap is a disease or a mental illness, but it is to say that a developmental handicap may be the result of a disease, illness or injury experienced pre-natally or during birth. Surex residents have sustained some hurt or loss of functioning, and the normal functioning of their persons has been chronically disturbed. In any event, I see no reason to distinguish between conditions brought about by disease, illness or injury, and the disease, illness or injury itself, especially where the level of care required to deal with the person's condition may be greater than that provided by hospitals. In addition to being persons with developmental handicaps, most of the residents of Surex do also suffer from other physical and mental illnesses which require special observation, treatment, and the administration of medication.

67. I agree with the Court's analysis in *Dignicare* and the Board's reasoning in *Select Living*. I am satisfied on the basis of the facts outlined above that while the nature of the "observation, care and treatment" of the residents of Surex is not necessarily of a medical nature, it is so fundamental to the maintenance of the residents' health, safety, and well-being that should they be deprived of the services of their primary care-givers as a result of a strike or lock-out, their condition would be jeopardized. Many of the residents of Surex do receive medication which must be administered by staff, and some residents receive physiotherapy from the Surex staff. Behaviour programs are in place to help train those residents who exhibit aberrant behaviour. At Surex, except for one resident, all of the residents require all services to facilitate them in the tasks of daily living, with some residents showing some capability in a few areas. It is also noteworthy that, except for the one individual living independently, Surex residents are always accompanied when going outside the homes. All of the above confirms the high level of dependence of Surex residents on the services provided.

68. As did the Court in *Dignicare*, I reject the employer argument that the meaning of "other institution" in the definition of "hospital" in the Act must be derived from the enumerated facilities in the definition. By including "or other institutions" in the definition section, the legislature left open the possibility that there may be other facilities which provide services to individuals who may not be able to care for and protect themselves and who could be negatively affected by a work stoppage. From the facts before me, there is little doubt that Surex provides a significant amount of observation and care to its residents. It also provides some forms of "treatment", albeit not all of a medical nature. It is particularly noteworthy that many of the residents are non-verbal and communicate by gestures, sounds, and facial expressions. It is inconceivable that such individuals would not be affected by the loss of their regular care-givers in the event of a strike or lock-out as they would, in addition to all of the other disruptions in their lives and routines as a result of a

work-stoppage, have to establish methods of communication with new people who may or may not be available for their care on a daily basis.

69. Having regard to the level of care provided to Surex residents and the potential impact of a work stoppage on the residents, I am not persuaded by the employer's argument that the replacement worker provisions of the *Labour Relations Act* should lead the Board to decide that this organization does not fall within the definition of "hospital" in HLDAA. In *Select Living (1991) Ltd.*, cited above, the Board stated as follows:

22. We have considered the argument made by the employer about the purpose of HLDAA in light of the replacement worker provisions enacted in 1993. We are not of the view that it is appropriate to hold that they influence the definition of the word hospital in HLDAA in the way suggested. Although it may be that the replacement worker provisions mean that a strike would be less disruptive than without such provisions, we are not persuaded that they can be construed as changing the meaning of the words in the definition of hospital in the pre-existing HLDAA. If the legislature had wished to make such an intention clear it could have, but did not.

As did the Board in *Select Living (1991) Ltd.*, I find that the replacement worker provisions enacted in 1993, as part of the amendments to the *Labour Relations Act* in no way influence the way in which the Board should consider the question of whether Surex is a "hospital" within the definition in the HLDAA. The HLDAA regime is designed to ensure that services to vulnerable people are not disrupted by a work stoppage. The *Labour Relations Act* replacement worker provisions simply ensure that any employer can, in certain circumstances, use *some* of its employees to do bargaining unit work in the event of a work stoppage. Prior to the enactment of the replacement worker provisions in 1993, employers were able to use *as many* strike replacement workers as they wished. It is therefore unclear how the employer can suggest that the 1993 amendments assist its argument.

70. I am satisfied that the residents of Surex, as developmentally handicapped persons and, in many cases, also physically handicapped persons, are dependent on those who care for them in every aspect of their lives, and as such, the *Hospital Labour Disputes Arbitration Act* is designed to ensure that they receive continuing and uninterrupted care from their care-givers, the employees of Surex Community Services. There was nothing in the evidence or submissions before me to suggest that in the process of de-institutionalization the provincial government intended that these persons should be put at risk simply because they were to be housed in smaller, community-based homes. The level and quality of services which are being provided to the Surex residents appear to be *more supportive* than the services they received in institutions as Surex provides individualized care and programs to allow its residents to attempt to reach their full potential, however limited that potential may appear to those unfamiliar with each individual resident. I am therefore satisfied that Surex Community Services can be considered as a "hospital" within the meaning of HLDAA.

71. The employer's argument that by finding Surex to be a "hospital" the Board would be participating in a labelling exercise and would be reviving the connotations of "institutionalization" is completely without merit. There was no evidence that there had been any impact on Surex as a result of having been designated as a HLDAA employer since 1992. The *Hospital Labour Disputes Arbitration Act* is a small piece of labour legislation, and it is unclear how designation under this Act would have negative consequences for Surex in the communities where it has residences. HLDAA designation has not affected the funding of Surex, and there was no evidence of any impact of the designation on the services provided, or on the people served. I therefore cannot find that Surex has suffered, or that it will suffer, any stigma as a result of being designated as a "hospital".

72. Having found that Surex Community Services falls within the definition of "hospital" in the HLDAA, it follows that the Board is in a position to advise the Minister that the employees of Surex are "hospital employees" within the meaning of the *Hospital Labour Disputes Arbitration Act*.

0801-94-R The Millwright District Council of Ontario on its own behalf and on behalf of Local 1916, Applicant v. **Tri-Corps Industrial Contractors**, Industrial Labour Corps. Inc., Scotron Holdings Inc., Christman & Leitch Contractors Ltd., Christman & Associates Contractors Ltd., Responding Parties

Construction Industry - Sale of a Business - Related Employer - Board not accepting union's characterization of certain individual as "key man" during relevant period - Two and one half years separating departure of alleged "key man" from company A and his joining company B - Company A continuing to grow and prosper following departure of alleged "key man" - Sale of a business and related employer applications dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. H. Wightman* and *K. S. Davies*.

APPEARANCES: *Harold F. Caley* and *Andrew Dobbie* on behalf of the applicant; *Russ Straus* on behalf of Christman & Associates Contractors Ltd.; *Ian S. Campbell*, *John Christman* and *Scott Hoag* on behalf of Tri-Corps Industrial Contractors, Industrial Labour Corps. Inc. and Scotron Holdings Inc.

DECISION OF THE BOARD; October 13, 1994

1. This application filed pursuant to section 64 and subsection 1(4) of the *Labour Relations Act* ("the Act") was heard by the Board on September 20 and 21, 1994.

2. In this application the applicant Millwright District Council of Ontario on its own behalf and on behalf of Local 1916 ("the Union" or "the Millwrights") asserts that the responding parties Tri-Corps Industrial Contractors ("Tri-Corps"), Industrial Labour Corps. Inc. ("Industrial"), Scotron Holdings Inc. ("Scotron"), Christman & Leitch Contractors Ltd. ("Christman & Leitch"), and Christman & Associates Contractors Ltd. ("Christman & Associates") carry on associated or related businesses or activities under common control or direction and for purposes of the Act constitute one common employer. The union further asserts that Tri-Corps is a "successor employer" as a "sale" of a "business" within the meaning of the Act has taken place by Christman and Associates to Tri-Corps. The Union asserts that as a result of these facts Tri-Corps is bound to the provincial Collective Agreement between the Association of Millwrighting Contractors of Ontario, Inc. and the Millwright District Council of Ontario ("the Provincial ICI Agreement").

3. The Board notes at the outset that Christman & Associates and Christman & Leitch were not represented by legal counsel. Mr. Russell Straus, the President, a Director and majority shareholder of Christman & Associates represented these two corporate respondents at the hearing. As a result the Board advised Mr. Straus at the commencement of the hearing that there was no requirement that parties appearing before the Board retain legal counsel. The Board often conducts hearings where one or more parties are not represented by legal counsel. The Board advised

Mr. Straus however that hearings before it were legal proceedings. The Board's function was to adjudicate upon the issues in dispute. The Board therefore could not act as an advocate for or an advisor to any party merely because that party was not represented by counsel. Such conduct would be inconsistent with the Board's role as a neutral adjudicator. As a result, the Board advised Mr. Straus that he must bear the responsibility for the presentation of the case on behalf of the corporate entities which he represented, and that he must bear any risk associated with the decision not to retain counsel. The Board did note the procedure typically followed in these types of applications, the issues in dispute, and indicated to Mr. Straus that if he had any questions with respect to the procedures before the Board we would attempt to answer such questions within the confines of our adjudicative role.

4. The Board heard the evidence of John Christman and Russell Straus. Each of these two witnesses presented their evidence in a clear, honest and forthright fashion. The relative credibility of the witnesses has not been a factor in our determination of this application as many of the relevant facts were not in dispute.

Facts

5. John Christman is a millwright by trade. He started his apprenticeship in 1964 working for Sutherland and Shultz and Canadian Comstock. After attending trade school he commenced employment with Lackie Brothers and completed his apprenticeship with that corporate entity. The Board takes note of the fact that each of these three corporations are established mechanical and millwright and rigging contractors in the construction industry in Ontario.

6. John Christman continued in his employment relationship with Lackie Brothers for approximately twenty years until in or about April 1985. During his employment he held successively more responsible positions as journeyman millwright, foreman, superintendent. In April 1985 when he ceased employment with Lackie Brothers he held the position of Vice-President, Service and Maintenance.

7. Ken Leitch and Russell Straus were also employees of Lackie Brothers. Russell Straus is also a millwright by trade and in 1985 had been employed by Lackie Brothers for approximately nine years.

8. In or about March or April 1985 John Christman and Ken Leitch left Lackie Brothers and incorporated Christman and Leitch. John Christman and Ken Leitch each owned or controlled fifty percent of the shares of that company. That company commenced operations as a millwright and rigging contractor. John Christman was a director and president of the corporation and a "key person" in its operations.

9. Shortly thereafter Russell Straus joined Christman and Leitch as a journeyman millwright. As indicated herein Russell Straus held successively more responsible jobs as foreman/supervisor often running jobs and projects on behalf of the company.

10. On April 8, 1985 Christman and Leitch voluntarily recognized the Union as exclusive bargaining agent for all of its millwright employees and became bound to the ICI provincial agreement.

11. In or about September 1985 John Christman purchased Ken Leitch's shares and interest in Christman and Leitch. On November 8, 1985 the name of the company was changed to Christman and Associates. John Christman continued as president and director of the company and remained a "key man" in its operations.

12. In or about March 1986 Russell Straus purchased twenty percent of the shares of Christman and Associates. Mr. Straus continued as foreman/supervisor with the company.
13. On July 7, 1986 Christman and Associates voluntarily recognized the Union as exclusive bargaining agent for all of its millwright employees and became bound to the ICI provincial agreement.
14. Originally Christman and Leitch, and subsequently Christman and Associates started "small". It sought out and bid on local small in-plant "maintenance" and "project" jobs within the industrial millwright and rigging industry, but would do any type of millwright or rigging job at which it was the successful bidder. In the early years the owners of the company regularly worked "on the tools". Christman and Associates continued to do a number of jobs which were "small" in terms of both the number of persons employed on the job and the total dollar value of the job. Mr. Straus estimated that these types of jobs continue to represent approximately fifty percent of Christman and Associates' current sales.
15. From its inception in 1985 until 1990 the millwright and rigging business of Christman and Associates grew from approximately five hundred thousand dollars in sales in its first year of operation to approximately six million dollars in sales for the 1991 fiscal year. From a small organization with few employees the business of Christman and Associates grew so that by 1991 the business had approximately twenty-five to thirty employees. At peak times (ie. during summer plant industrial shutdowns when much millwright and rigging work is performed) the employee complement would grow to one hundred. The company's market share and market area were also increased over this five year period.
16. Throughout 1985 to 1990 the respective roles of the eighty percent shareholder John Christman, and the twenty percent shareholder Russell Straus, also grew and developed. By 1990 John Christman's energies were devoted principally to the administrative side of the business. He continued to estimate jobs, explore customer contacts, bid on jobs etc. By 1990 Russell Straus was also doing some estimating and was responsible primarily for the operations side of the company looking after jobs which had been acquired by Christman and Associates.
17. During the period from 1985 to 1990 the growth of Christman and Associates was directly attributable to John Christman. He was the "key person" who directed the growth and development of the company, and who dictated its policies and the directions it would take.
18. In 1990 Russell Straus approached John Christman with the idea that he wanted to start his own business. At the time John Christman was not anxious to have Russell Straus leave the company to start up his own business. Mr. Christman was also considering certain tax implications confronting him and the company. After further discussion it was agreed that John Christman would sell to Russell Straus his shares in Christman and Associates.
19. The sale of the shares occurred pursuant to an agreement dated February 14, 1990. As part of the sale agreement John Christman was required to sign an employment and non-competition agreement. Some of the details of these two arrangements require further elaboration.
20. At the time of the sale of the shares Mr. Christman owned forty common shares in the company while his spouse owned forty special shares (Russell Straus in turn owned ten common shares while his spouse owned ten special shares). Mr. Christman sold his forty common shares to Mr. Straus for three hundred and forty-five thousand dollars. His spouse sold her forty special shares to Mr. Straus for an additional three hundred and forty-five thousand dollars. The entire

purchase price (\$690,000.00) was payable and was in fact paid shortly after the closing of the share transaction on February 16, 1990.

21. The financing for this transaction was obtained by Russell Straus through arrangements with his bank. In addition, John Christman and his spouse each agreed to loan fifty thousand dollars to Russell Straus (and his company Straus Industrial Contractors Limited) for a total of one hundred thousand dollars. That loan bore interest at 10 percent per annum, was to be payable two years after the closing, and was secured by promissory notes. The promissory notes were collaterally secured by a second charge upon the fixed assets of Christman and Associates. The promissory notes also contained a provision that if John Christman ceased to be an employee of Christman and Associates the notes became due and payable prior to their maturity. As detailed herein John Christman's employment with Christman and Associates was in fact terminated and the loan was paid in full at that time.

22. The employment and non-competition agreement was entered into as part of the consideration which passed between the parties to the share purchase agreement, and represented as consideration John Christman's agreement "to provide ongoing advisor/consulting services to" Christman and Associates, together with his agreement not to compete. The employment agreement was for a three year term from February 16, 1990 to February 15, 1993. It lists John Christman's duties as:

DUTIES

(a) The Employee will be responsible for customer contacts and the promotion of new business relating to estimating jobs of the millwrighting and rigging variety. The Employee further agrees to provide such services and expertise as may be reasonably required to facilitate the profitability and growth of the Corporation.

(b) The Employee agrees to use his best efforts to serve the Corporation during the term of his employment and to promote the best interest of the Corporation. The Employee shall perform all duties on a timely basis and in a diligent, faithful and conscientious manner and in the best interest of the Corporation.

23. Pursuant to the employment contract John Christman was paid an annual salary plus a bonus based on a percentage of net income before taxes and a monthly car allowance. He was also entitled to certain pension and medical benefits and vacation.

24. Although the term of the employment contract was for three years, the contract itself contained provisions for its earlier termination. Christman and Associates could terminate John Christman's employment at any time by giving six months written notice or by paying six months salary in lieu of written notice. If terminated, the non-competition clause agreed to by Mr. Christman would cease to apply either at the end of the six month written notice period, or six months after the termination if the payment in lieu of notice option was exercised. As noted the one hundred thousand dollar loan secured by the promissory notes also became due and payable upon John Christman's termination.

25. Although he undoubtedly had much personal experience (especially in the operations side of the business) Mr. Straus was new to the running of the company and he wanted to retain John Christman's experience and expertise to assist him in running the company and to maintain customer contacts. Certainly at the time of the share purchase agreement and employment and non-competition agreement, John Christman brought to the business his contacts in the millwright and rigging industry, his business knowledge and acumen to keep the company running, and his ability to get jobs and see them to completion in a manner profitable to the company.

26. As of February 16, 1990 Russell Straus and his spouse became the sole shareholders of Christman and Associates. Mr. Straus became president of the company while his spouse became secretary-treasurer. Both were directors and officers of the company. Although neither an officer nor director of the company, John Christman stayed on as a employee and fulfilled primarily the role of estimator and salesperson. Both John Christman and Russell Straus would estimate jobs, solicit customers, get Christman and Associates on customer bid lists, and after obtaining jobs would ensure the work was carried out and completed ie. ensure the necessary materials, equipment and labour were all dispatched to the job.

27. Shortly after obtaining one hundred percent ownership of Christman and Associates Mr. Straus sold a thirty percent interest in the company to six persons whom he characterized as "key people" at the time. These minority shareholders included a millwright estimator, the fabrication shop manager, and certain foremen/supervisory employees. Each minority shareholder obtained a five percent interest in the company upon paying fifty thousand dollars to purchase that interest. Since that time one of these minority shareholders has sold his interest. At present Russell Straus and his spouse own seventy percent of the company while five minority shareholders each owning six percent control the other thirty percent. The spouses of these five minority shareholders are each officers and directors of Christman and Associates. The three hundred thousand dollars raised through the sale of this thirty percent interest went into the general operating account of Christman and Associates.

28. After Russell Straus bought the shares and became president, the company continued to operate as a millwright and rigging contractor under the name of Christman and Associates. It also continued its growth.

29. In February 1991 Christman and Associates exercised its option and terminated the employment of John Christman by providing to him six months pay in lieu of notice. Russell Straus testified that it was his decision to terminate John Christman's employment relationship because he felt at the time that Christman and Associates was "not getting a full honest days work for" the wages and bonus which it was paying to John Christman. Although John Christman continued to be very capable it was Mr. Straus' opinion that he was not devoting the same amount of time and energy to Christman and Associates as he had been doing when he was its president and majority shareholder. What Mr. Christman did he did well. Mr. Straus just felt it wasn't enough and was of the belief and hope that the company could survive without John Christman.

30. Since John Christman's departure from the company in February 1991 Christman and Associates has in fact continued to do well. Its sales continued to grow. The company added an electrical department to its operations, purchased a second boom truck and created separate departments (piping, boom truck, millwright and rigging, fabricating, equipment shop) to better track its various costs. The overall employee complement at Christman and Associates also increased from approximately twenty-five to thirty employees in 1991, to approximately fifty-five to sixty employees in 1993 (with a peak during summer shutdowns of approximately 150 employees). Included in that growth is the addition of five full-time millwrights. Sales in the millwright and rigging department have also grown from approximately six million in 1991 to approximately eight million in 1993. As set out herein however in recent times the profitability of the company and its sales in its millwright and rigging department have started to decline.

31. Prior to John Christman's departure from Christman and Associates another estimator had been hired by the company. After John Christman's departure an estimator was hired and one of the field foreman/supervisors was brought in to perform the sales and estimating duties. In this

fashion Christman and Associates replaced the experience and expertise lost in these areas when it determined to terminate its employment relationship with John Christman.

32. After his employment was terminated in February 1991 John Christman continued to be bound by the non-competition clause for the next six months. As a result he remained unemployed and did some personal things including building a cottage.

33. In September 1991, John Christman commenced work for another unionized millwright rigging contractor called Process Mechanical Industrial ("PMI") a division of Process Industrial Company Inc. Mr. Christman had been approached by Cliff Snyder the president of that company. Mr. Snyder was a personal friend of Mr. Christman as the two men had worked together at Lackie Brothers until 1985 when John Christman left the company. Mr. Snyder himself had left Lackie Brothers sometime after 1985.

34. At PMI Mr. Christman was appointed manager in-plant service. His duties were to concentrate on local based operations ranging from in-plant maintenance service to equipment installation service to equipment installation, relocation and rebuilding. He was also to undertake other selected special projects which fell within his area of expertise.

35. John Christman remained with PMI until May 1993. There is nothing in the evidence to suggest that while he was employed at PMI the business of Christman and Associates ceased to grow as a result of Mr. Christman's return to the market area. Indeed the evidence indicates Christman and Associates continued along its growth pattern.

36. In May 1993 John Christman was laid-off by PMI as a result of a lack of work.

37. While employed at PMI Mr. Christman had come into contact with Scott Hoag. Mr. Hoag is also a millwright by trade and had been employed in the sales department at PMI performing sales and estimating functions with respect to the millwright work for that company.

38. In the fall of 1993 Mr. Hoag approached Mr. Christman. After some discussions the two men decided to form a partnership and carry on business as a millwright and rigging contractor. For tax planning purposes John Christman incorporated a holding company (Industrial) wholly owned by himself, his wife and a Christman family trust. Scott Hoag incorporated a holding company (Scotron) wholly owned by himself and the Hoag family trust. In turn, on December 1, 1993 these two holding companies formed an equal partnership. The name of the partnership is Tri-Corps.

39. Tri-Corps commenced its operations as a millwright and rigging contractor in December 1993. As did Christman and Leitch and subsequently Christman and Associates, Tri-Corps has also started out small. At present it employs Scott Hoag and John Christman plus two other millwrights. These millwrights have not necessarily been employed on a full-time, forty hour per week basis but have been engaged by Tri-Corps to meet work load demands. In addition Tri-Corps may call on two "helpers" on an as needed basis.

40. At Tri-Corps Scott Hoag and John Christman are each a "key person". Each solicits customers, estimates jobs, bids on work and performs the actual millwright and rigging work to complete the jobs which Tri-Corps obtains. It is John Christman's hope and expectation that the business of Tri-Corps will grow beyond its present small size. To that end Tri-Corps will take advantage of all opportunities presented to it although it presently continues to focus and obtain primarily the smaller "in-plant maintenance" type jobs.

41. In order to obtain work for this new partnership, both Scott Hoag and John Christman sent out letters to various industrial and manufacturing enterprises. Although Tri-Corps would like to stay “close to home” in the Kitchener-Waterloo area, it has also solicited customers west of that area as far away as London, and east of that area to Toronto. This is generally the same market area served by Christman and Associates. In addition to letters soliciting customers, Tri-Corps obtains its work and leads for new work in much the same manner as many other millwright and rigging contractors --- personal contacts at the plants, word of mouth, leads from customers and vendors etc. At least some of the letters of solicitation sent by John Christman were sent to prospective customers for whom Christman and Associates had performed millwrighting and rigging work in the past (although these customers were not “exclusive” customers of Christman and Associates and had engaged other millwright and rigging contractors to perform services on their behalf).

42. We heard much evidence about the nature and type of work performed by Christman and Associates and Tri-Corps and the clientele or customer each services. We do not propose to detail that extensive evidence. It is sufficient to note that within this industry and this market place there is a finite number of “customers” or industrial and manufacturing enterprises who may from time to time require the services of a millwright and rigging contractor. There are a number of both unionized and non-unionized contractors who provide services to a “core” group of customers. These customers do not necessarily make exclusive use of a particular millwright and rigging contractor and may at various times and for various purposes engage a number of different contractors. In recent times competition for the available work has increased amongst the millwright and rigging contractors.

43. Notwithstanding assertions to the contrary, and notwithstanding the fact that Christman and Associates is a multi-trade contractor and not merely a millwright and rigging contractor as is the case with Tri-Corps, we find that when Tri-Corps entered the market it became an actual and potential competitor of Christman and Associates. Notwithstanding their respective size there is a degree of overlap in the activities of both Tri-Corps and Christman and Associates. The area of overlap is not total and the scope of work in which Christman and Associates is engaged is presently much broader than that of Tri-Corps (including as it does for example electrical and piping work). We consider it more significant however to focus on the general nature of the millwright and rigging work performed and the skills of the employees who do that work. To that end it is sufficient to note that both Tri-Corps and Christman and Associates in a general sense operate similar millwright and rigging businesses in Southern Ontario in competition with each other and in competition with a number of other millwright and rigging contractors.

44. Since Tri-Corps commenced its operations the millwright sales at Christman and Associates have decreased. Although Christman and Associates’ sales are still up when compared to its sales in February 1991 when John Christman’s employment was terminated, since December 1993 its actual sales in the millwright and rigging department together with its profits for that department have declined. We do not find it necessary to conclusively determine the matter but have assumed for purposes of these applications that at least one of the factors for the decline in sales is the existence of Tri-Corps as another competitor in this millwright and rigging market place.

45. When he commenced his partnership with Scott Hoag, Mr. Christman determined not to use the Christman name. He testified that he didn’t want to use his name because “I didn’t want any confusion to exist when we went out to sell our services with the company that I have sold. I felt it would have been a detriment had I done that”. In cross-examination and subsequently in response to a question from the panel Mr. Christman elaborated that he “didn’t want to have any misunderstanding within the market place that there was any connection between the two compa-

nies. Customers frown on having two companies come in to bid to find out that they are connected.... I didn't think it would do my business any good for someone to have that impression. We were a new business, a new start-up and that's how we wanted it."

46. Finally, we note that after John Christman left Christman and Associates in February 1991 there was no continuing relationship between Christman and Associates and John Christman or the companies with which he subsequently became associated --- either PMI as an employee or Tri-Corps as a partner. Neither Russell Straus nor his spouse nor any of the minority shareholders of Christman and Associates have any interest (financial or otherwise) direction or control of Tri-Corps, Industrial or Scotron. Neither Scott Hoag nor John Christman, nor their respective holding companies, nor their partnership Tri-Corps have any interest (financial or otherwise) direction or control of Christman and Associates. The companies operate as separate and distinct entities and as noted compete with each other. There has not been any interchange of employees, no hiring of former Christman and Associates' employees by Tri-Corps and no transfer of work from Tri-Corps to Christman and Associates or from Christman and Associates to Tri-Corps. Tri-Corps and Christman and Associates have separate business addresses, separate fabrication and shop facilities, separate banks and each issues cheques in their own name. There has not been any purchase of equipment by Tri-Corps from Christman and Associates, nor is there any other type of financial support or arrangement between Christman and Associates and Tri-Corps, or amongst the principals John Christman, Scott Hoag and Russell Straus.

47. We do not propose to fully set out the able submissions of the parties but intend to merely summarize and briefly highlight their respective positions.

48. The substance of the submissions made by counsel for the trade union was that John Christman is and was a "key person" in the operations of Tri-Corps, Christman and Leitch and Christman and Associates with the result that each of these three entities were associated and related employers under common direction and control within the meaning of subsection 1(4). With respect to the section 64 application counsel asserted that as "key person" John Christman was "the business". When Tri-Corps commenced its operations it acquired John Christman and his "business". In essence, John Christman merely started a new company doing the same type of millwright and rigging work, operating in the same market place, in the same geographic area. Counsel pointed to the solicitation letters sent by Tri-Corps to customers who were also customers of Christman and Associates noting that in December 1993 John Christman was merely continuing in a new form the company which he had started and built up from 1985 to 1991. The fact that there was a hiatus between Mr. Christman's association with Christman and Associates and the start of his new business was not significant and did not affect his status as a "key person" (*Ian Somerville Construction Ltd.*, [1988] OLRB Rep. Oct. 1022, *Steeles Electric*, [1994] OLRB Rep. May 603).

49. Counsel asserted that just as Christman and Associates started small and was built-up, Tri-Corps was also starting off small but with the expectation that it would grow. That expectation arose because of the past experience and expertise, customer contacts and goodwill and reputation which John Christman had. Those same assets were brought to Tri-Corps as John Christman continued to carry on business in the exact same manner as before but with a new business entity.

50. It was submitted that the trade union ought not to be penalized for bringing its application in a timely fashion before there was evidence of significant erosion of their bargaining rights. There was in fact actual and potentially greater erosion of those bargaining rights as was evidenced by the fact that the unionized Christman and Associates had experienced a decrease in sales which was in part attributed to Tri-Corps' entry in the market place. There was also evidence that one

particular sale had been lost by Christman and Associates to Tri-Corps. In support of these various submissions counsel relied upon *Construction P.H. Grager Inc.*, [1985] OLRB Rep. Feb. 233; *Stucor Construction Ltd.*, [1987] OLRB Rep. Apr. 614; *Ian Somerville Construction Ltd.*, *supra*, *Warren Steeplejacks Limited*, [1989] OLRB Rep. Mar. 309; *Kent Acoustics Limited*, *City Acoustics Limited*, *J. L. Acoustics Ltd.*, August 12, 1990, Board File No. 1367-89-R [now reported at [1990] OLRB Rep. Aug. 855]; *Douglas MacDonald Development Corporation*; *Douglas Ronald MacDonald*, *David Colin Anderson and David Victor Spillenaar*, September 20, 1990, Board Files Nos. 1071-89-R, 1072-89-R; *Deluxe Electrical Contractor Ltd.*, [1990] OLRB Rep. Nov. 1135; *Aibly Concrete Floor Limited*, [1991] OLRB Rep. May 579; *Gallant Painting*, [1991] OLRB Rep. Sept. 1051; *Kepic Wrecking Inc.*, [1993] OLRB Rep. June 516; *Merit Contractors of Niagara*, [1994] OLRB Rep. Feb. 152; *Steeles Electric*, *supra*, *Central Forming & Concrete Inc.*; *Altracon Construction Limited*; *Gaspo Construction Limited*; *Ashworth Engineering Inc.*, July 18, 1994, Board File Nos. 3666-93-R, 3667-93-G, 3857-93-R [now reported at [1994] OLRB Rep. July 805].

51. Counsel for Tri-Corps asserted that the pre-requisites for a declaration pursuant to section 64 or subsection 1(4) had not been established. There was neither a sale of a “business” nor common direction and control. Although John Christman may have been a “key person” in Christman and Associates up until 1990, his status changed after he sold his shares in Christman and Associates to Russell Straus. Thereafter he was no longer a “key person” as evidenced by the fact that Christman and Associates terminated his employment in February 1991 and continued to carry on business and grow without John Christman after that termination. The hiatus between John Christman’s departure in February 1991 and the commencement of the Tri-Corps business in December 1993 was significant and indicated that whatever good will was associated with the key person had evaporated.

52. Counsel argued also that the business and activities of Tri-Corps and Christman and Associates could not be said to be “associated or related”. The activities of the two entities were different, their respective size and consequent ability to perform certain jobs was different, and each served a different market place with Tri-Corps focusing on small maintenance projects. There was no relationship, interchange of employees or any other functional interchange between the two entities. Counsel also asserted that there was no common direction and control as there was no overlap of shareholders, officers or directors. There was no financial support between Tri-Corps and Christman and Associates. The usual indicia of common premises, logos, sales staff, management expertise were also absent. In instances such as these where both entities continue to exist common direction and control must be contemporaneous as of the date of application.

53. Moreover, the purpose of both section 64 and subsection 1(4) was remedial, to preserve and protect bargaining rights and not extend them. Neither section was intended to be a shortcut to certification. Where, as here the “predecessor” or “related” company was still in business and doing well there was no mischief which application of these provisions would cure. There was no erosion of bargaining rights but merely legal competition in the market place. Loss of work due to competition was not in and of itself sufficient reason to grant either a declaration of successorship or a common employer declaration. In his submissions counsel relied upon *Rivard Mechanical*, [1981] OLRB Rep. May 550, *In-plant Contractors Inc.*, [1993] OLRB Rep. May 421, *Merit Contractors of Niagara*, [1994] OLRB Rep. Feb. 152, *Pinecrest Queensway Health and Community Services*, [1992] OLRB Rep. Nov. 1211, *Rosmar Drywall and Acoustics Limited*, Unreported decision Board File Nos. 0863-92-R, May 14, 1993.

Decision

54. The relevant portions of section 64 and subsection 1(4) of the Act state:

64.(1) In this section,

“business” includes one or more parts of a business; (“entreprise”)

“predecessor employer” means an employer who sells his, her or its business; (“employeur précédent”)

“sells” includes leases, transfers and any other manner of disposition; (“vend”)

“successor employer” means an employer to whom the predecessor employer sells the business. (“employeur qui succède”)

• • •

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

• • •

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

1-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The Sale of a Business Application

55. A brief review of the principles which underline the application and interpretation of section 64 is useful.

56. Section 64 is a remedial provision. The purpose of the section has been succinctly summarized in a number of decisions of the Board. Thus in *Tatham Company*, [1980] OLRB Rep. Mar. 366 the Board, referring to its earlier decision in *Aircraft Metal Specialist Limited*, [1970] OLRB Rep. Sept. 702 stated:

19. ...

“The purpose of section 47a [now section 64] becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect ‘paper transactions’, and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond ‘paper transactions’ to achieve that purpose. See, e.g. *Kem’s Masonry*, [1964] OLRB Rep. Dec. 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of

their union becoming the bargaining agent through certification or voluntary recognition. Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business."

20. Section 55 [now section 64] prevents the destruction of bargaining rights or a dislocation of the collective bargaining *status quo*, by transforming the institutional rights of the union and the collectively bargained rights of the employees into a form of "vested interest" which becomes rooted in the business entity, and like a charge on property, "runs with the business." To accomplish this objective, the statute gives a very special meaning to the word "sale", envisages that bargaining rights can be continued in a severable "part" of a business, abrogates the notion of privity of contract, and eliminates the significance of the separate legal identity of the new employer.

57. In *Gallant Painting, supra*, the Board stated at paragraphs 41 to 44:

41. As noted, section 63 [now section 64] is designed to preserve bargaining rights where there is a "continuum of the business". (See also *Thunderbay Ambulance Services Inc.*, [1978] OLRB Rep. May 467.) The broad and liberal interpretation which the statute has given to the term "sells" as including "any other manner of disposition" underscores the purpose of the section. Regardless of legal form, and regardless of the actual physical transfer of fixed assets, inventory or equipment, customer lists, accounts receivable or the like, for labour relations purposes a "business" or "part of a business" may nonetheless have been "transferred" or "disposed" of in "any other manner".

42. Given the remedial purpose of section 63, the primary focus of the Board in applications under section 63 is what is the "business" of the predecessor to which the bargaining rights have become attached or "vested". Rather than focusing upon the legal forms and commercial transactions which surround the circumstances which gave rise to the section 63 application, the Board looks to the predecessor's "business" and determines if this has been "disposed" of in some manner to the successor or if there has been a continuum of that business by the successor. Have the essential elements of the predecessor's "business" been transferred to the successor thereby enabling the successor to continue the business? (See for example *Grand Valley Ready-Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663)

43. The determination as to what constitutes the "business" of the predecessor is not an easy task. The Ontario Labour Relations Board Reports contain a multitude of cases involving section 63 applications. It is however impossible to extract from these cases a single factor or element which is always determinative. The difficulties surrounding the factual determinations which the Board must make are compounded by the fact that the elements or factors which are significant in each case can vary with the business context. As a result, there are very few "text book" cases. As was noted in *The Tatham Company Limited*, [1980] OLRB Rep. Mar. 366:

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while arising out of materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a 'sale of business' finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, 'know-how', technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses,

these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section [63] must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

44. A "business" is the totality of the undertaking. A "business" may include such tangible assets as tools, equipment, machinery, physical buildings together with such less tangible assets as skilled management and operating personnel and intangibles such as goodwill (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193). A "business" must be distinguished from the work performed or carried out by the business. This is particularly true in circumstances such as the present which involve a business which obtains its work by being the successful bidder on contracts which are regularly sent out for tender (either public tender or invited tender).

58. Thereafter the Board referred to its decision in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 to note that mere continuity of work is not necessarily in and of itself sufficient to found a successor employer declaration under section 64. In *Metropolitan Parking* the Board noted:

...

33. There need not be a transfer of the entire business before section [64] comes into play. The successor rights provisions may also be triggered by the transfer of "part of a business." [See section 64(1).] This language suggests that bargaining rights continue when something considerably less than "the totality of the undertaking" has been transferred. Presumably the Legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, cohesive portion of the economic organization or activities which comprise the totality of "the business." The Board has found a transfer of "part of a business", where one of a chain of retail stores has been sold to a competitor (*Supercity Discount Foods*, [1979] OLRB Rep. Apr. 119; *Loblaws Groceries Ltd.*, [1973] OLRB Rep. Jan. 73); where there is a transfer of the right and means to produce one of the products formerly produced by the predecessor's business; (*Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Co. Ltd.*, [1970] OLRB Rep. Jan. 1244), and where there was a transfer of the oil burner installation and service branch of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Ltd.*, [1971] OLRB Rep. May 515.) In each of these cases the Board found that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, "know how" and goodwill - thereby allowing the successor to serve the market formerly served by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. It was otherwise in *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732, *Canada Cement LaFarge Ltd.*, [1975] OLRB Rep. Dec. 905, and *Dufferin Steel*, [1976] OLRB Rep. Mar. 81. In these cases there was a significant change in the character of the work, product or market so that the Board concluded that what had been transferred was not the predecessor's business. The successor had merely incorporated incidental elements of that business into his own economic organization - even though each of the elements acquired could previously be found in the predecessor's business organization and, in that sense, were "part" of the predecessor's business. What was transferred lacked that dynamic quality which distinguishes an idle collection of surplus assets from an active, severable and coherent part of a going concern.

34. This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a "business", or "a part of a business" and the transfer of "incidental" assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides

an unequivocal guideline for the way in which the issue will be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in a similar business, or has set up a "new" business which resembles the "old" one in many respects. In *Ralph Ford Electrical*, [1974] OLRB Rep. June 388, for example, several key employees of the alleged predecessor became dissatisfied and struck out on their own in competition with their former employer. In that case the Board found that there was not a transfer of a business, but rather the creation of a new "parallel" business which only incidentally made use of some of the tangible elements of the predecessor's business organization. Similarly, in *Sunnybrook Food Mkt.*, [1974] OLRB Rep. Jan. 47 the continuation of a grocery business on the same premises, and with some of the same fixtures, was not enough to support a successorship finding. the Board was not satisfied that there had been a transfer and continuation of the predecessor's business (i.e., the business that he *owns and operates*) but simply the continuation of a like business. It is recognizable that so long as there is a market for a product, some entrepreneur is likely to appear who will produce for that market and, in so doing, he may share many of the characteristics of his alleged predecessor.

• • •

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand. [emphasis added]

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 - a case which, like the present one, involved the consequences of a loss of a contract:

There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

The focus of section 55 is the business entity - the employer's total economic organization - not simply the work which the employees perform.

• • •

44. For a transaction to be considered a "sale of a business" there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a "going concern". A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so. Bargaining rights are continued only when the employer transfer *his* business. The use of the active verb and possessive pronoun is not insignificant.

59. The substance of the union's case is that in a bid oriented business in the construction industry similar to that of Tri-Corps and Christman and Associates, the essential element of the

“business” resides in the estimating expertise and management experience of John Christman. In effect, John Christman was so “key” to the business of Christman and Associates that he is the personification of the business. Thus, when this key asset was transferred or moved from Christman and Associates to Tri-Corps there was a “sale” of the “business” within the meaning of section 64.

60. We were referred to a number of “key person” cases which we do not propose to analyze. Suffice it to say that each case did and must of necessity turn on its own particular facts. There are a number of cases in which labour relations consequences *did* attach to the movement of a key person to a new entity as the Board found a “sale” occurred when the key person moved and in effect took the “business” with him or her (see for example *Stucor Construction Limited*, *supra*, *Deluxe Electrical Contractor Limited*, *supra*, *Construction PH Grager Inc.*, *supra*, *Gallant Painting*, *supra*, *Kepic Wrecking Inc.*, *supra*, *Steeles Electric*, *supra*).

61. On the other hand there are also a number of cases in which the movement of persons to a new entity did not attract labour relations consequences pursuant to section 64 (see for example *Jen-Ry Utility Contracting Company Limited*, [1984] OLRB Rep. Dec. 1724, *Braneyda Mechanical Service Limited*, [1981] OLRB Rep. Aug. 1102, *Rivard Mechanical*, *supra*, *Ralph Ford Electric*, [1974] OLRB Rep. June 388, *Merit Contractors*, *supra*, *In-plant Contractors*, *supra*, *Drycor Electric*, Board File No. 0032-93-R unreported decision dated June 20, 1994).

62. In a number of the cases referred to by the trade union the Board found that the movement of a “key person” did not amount to a “sale” of “the business” but did cause the Board to conclude that two entities carried on associated or related activities under common direction or control (see for example *Ian Somerville Construction Limited*, *supra*, *Warren Steeplejacks Limited*, *supra*, *Kent Acoustics Limited*, *supra*, *Douglas MacDonald Development Corporation*, *supra*). This issue will be addressed in greater detail below.

63. Thus it can be seen that not every movement of managerial personnel from one business to another will constitute a sale of a business within the meaning of section 64. In addition, the cases indicate that bargaining rights attached to a “business” and not to an individual. It is only where the key person is so identified with the “business” that it is realistic to view his/her movement to be a transfer of all or part of a “business” that a declaration pursuant to section 64 will be made. To hold otherwise would result in a “sale” whenever an expert, experienced manager, estimator, field supervisor or similar managerial personnel left the unionized company to join another. Within the construction industry it is not unusual to find persons who have obtained specific expertise or management knowledge and experience, who have developed entrepreneurial skills, or who have otherwise acquired specialized abilities by reason of their employment history or association within the industry. It is inevitably these types of attributes which enable persons within the industry to either attract offers of employment from other companies or individuals, or which permit them to start up their own business enterprise either alone or in conjunction with others who may have similar or complimentary expertise, knowledge and skills. Certainly, in instances where a business has started from scratch (as is the assertion in the case before us) it is difficult to imagine anyone who does not have some experience, skill or expertise. A complete novice to the construction industry is not likely to start up his/her own business in the industry.

64. In the result we concur with the observations of the Board in *Merit Contractors of Niagara*, *supra*, where the Board stated:

14. As the Board pointed out in *Gallant Painting*, *supra*, not every movement of a person significant to a business will constitute a sale of business within the meaning of the *Labour Relations Act*, or otherwise attract labour relations consequences. In that respect, the applicants were

unable to point to any “key person” case in which the Board found a sale of business where the “key person” did not hold an ownership interest in the alleged predecessor or a vendor entity which subsequently ceased to operate. It is conceivable that an individual could be a “key person” and that a business could survive his/her departure. But however important a person may be to the operation of a business, s/he will not be a “key person” within the meaning of the Board’s sale of business jurisprudence unless the business is substantially different without him/her. That is, for an individual to be “key person”, s/he must be identified with a business or some significant part of it.

65. The evidence in this case indicates that in fact the business of Christman and Associates was *not* substantially different without John Christman. After John Christman sold his shares to Russell Straus and ceased to “call the shots” at Christman and Associates, the business of Christman and Associates continued to operate and grow. Of even greater significance is the fact that after John Christman’s employment was terminated the business of Christman and Associates did not only continue to operate but expanded. After Russell Straus concluded in February 1991 that the company could survive John Christman’s departure, the millwright and rigging sales at Christman and Associates continued to grow, and its total employee complement nearly doubled in size. Although a significant part of that growth in employee numbers was in the other trade classifications such as electricians, approximately five full-time millwrights have also been added to the Christman and Associates’ payroll since February 1991. Christman and Associates continued to operate in the same market place doing the same type of millwright and rigging work with the same type of millwright employees for the same or the same type of customer. There was no appreciable difference between the business of Christman and Associates in February 1991 before John Christman’s departure and thereafter.

66. Whatever may have been the status of John Christman prior to February 1991 (and there is no doubt that at least until February 1990 he was the “key person” at Christman and Associates) the evidence indicates that by February 1991 he could no longer be considered “key” to the continued operations of the business. Indeed the evidence highlights the fact that during the course of an enterprise’s history the “key” personnel may change. The founder may change. The founder of the company does not necessarily remain as its key person or one of its key personnel. The passage of time may result in a loss of “key person” status and can lead to the conclusion that persons formerly key to the organization are no longer so identified with the organization as to be viewed as the personification or the very essence of “the business”.

67. That this is what occurred in this case is evidenced both by the fact that (a) Mr. Straus as president and majority shareholder of Christman and Associates felt sufficiently comfortable to terminate the services of Mr. Christman at a time when the latter was contractually bound to remain in his employ for a further two years (thus incurring also a penalty of pay in lieu of notice); and (b) Christman and Associates continued to prosper after John Christman’s termination.

68. We have concluded that in February 1991 John Christman was no longer the “key” person at Christman and Associates and could no longer be perceived as “the business” of Christman and Associates. His movement elsewhere would not therefore in and of itself cause us to conclude that there has been a sale of the Christman and Associates “business” to Tri-Corps.

69. Are there any other factors present which warrant or support remedial or declaratory relief pursuant to section 64? We find that there are not. There has not been any sale or transfer of goodwill, customer lists, accounts receivable, existing contracts, inventory or equipment. There has not been any interchange of employees or hiring of former Christman and Associates’ employees by Tri-Corps.

70. What there has been is some solicitation of Christman and Associates’ “customers”.

This fact either standing alone or even in conjunction with the involvement of John Christman as a former “key” person at Christman and Associates is not however sufficient to constitute a sale of a business within the meaning of section 64 of the Act. In this regard the nature of the in-plant maintenance and construction millwright and rigging business is also significant. The evidence discloses that these customers are not and have not been exclusive customers of Christman and Associates. Rather these customers call upon the services of different millwright and rigging contractors who operate in competition with each other in this marketplace. Tri-Corps is but yet another competitor.

71. Although John Christman did have prior contact with these customers while at Christman and Associates, and although these contacts have undoubtedly assisted him and his partner Scott Hoag at Tri-Corps (as Scott Hoag’s contacts would equally assist), it can’t be said that there has been a “continuum of the business” of Christman and Associates in Tri-Corps. The nature of the industry negates such a finding.

72. Tri-Corps is not simply a continuation of the business John Christman started as Christman and Leitch and later Christman and Associates. Rather it is a similar and parallel business established in competition with Christman and Associates. The alleged successor has set up a new business while the alleged predecessor’s business is unchanged and continues to actively and successfully operate. The loss of sales at Christman and Associates may be due to this competition but are not the result of any “sale” of all or part of the “business” within the meaning of section 64 of the Act.

73. The root of the Tri-Corps business does not lie with Christman and Associates. The root of the Tri-Corps business lies in the personal attributes of John Christman and Scott Hoag. That is not to say that Tri-Corps. started out “from scratch”. As has been noted, in the construction industry in particular, persons will of necessity rely on exposure and contacts made while engaged in other positions in that industry. In this case the “know-how”, expertise, experience and reputation which are essential in this bid oriented market were acquired by John Christman and Scott Hoag from having worked in the industry for nearly thirty years. They were not acquired from, and are not merely rooted in, the business of Christman and Associates.

74. To find a sale of a business in these circumstances would be to create trade union bargaining rights where there were none.

The Common Employer Application

75. We note at the outset that the fact that there has or has not been a “sale” of a “business” within the meaning of section 64 does not necessarily mean that Tri-Corps and Christman and Associates do or do not constitute one common employer under subsection 1(4) of the Act. Section 64 and subsection 1(4) are not mutually exclusive (see *Economy Store Fixtures Limited*, [1992] OLRB Rep. May 575).

76. Once again we find it useful to briefly refer to the purpose of subsection 1(4). In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 the Board stated:

Section 1(4) was enacted in 1971 and deals with a situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective

bargaining structure: nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [64] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section [64] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section [64]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeable, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of businesses between related business without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section [64] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present: and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

15. ...it is now clear that the "associated or related activities or businesses" need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business or endeavour or even contemporaneously economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil". (See also *Pinecrest-Queensway Health and Community Services*, *supra*).

77. In this case it is not disputed that there exist two or more entities. Although counsel for Tri-Corps. asserted otherwise, we are satisfied that the second criteria for a common employer declaration is also present insofar as the two entities carry on associated or related activities. In *Frank Plastina Investments Limited*, [1986] OLRB Rep. June 720 the Board held:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature ("associated" or "related", "activities" or "businesses"). It is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine*, *Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al*, CLLC 14.270), and it is one with which we respectively agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are "unrelated" - particularly if they are being undertaken at the same time and involve common managerial or employee skills. ...

78. Although the activities of Tri-Corps. and Christman and Associates are not identical there is sufficient overlap to find their activities to be "related" within the meaning of subsection 1(4). The nature of the work being performed and the skills of the employees point to such a finding. Tri-Corps and Christman and Associates are both engaged in the construction industry as millwright and rigging contractors employing millwrights to perform in-plant "maintenance" and "construction" millwrighting work. The differences which do exist are not of such a magnitude as to cause us to conclude that their activities are "unrelated" for purposes of subsection 1(4) (See for example *Warren Steeplejacks Limited*, *supra*).

79. As noted sections 64 and subsection 1(4) are not mutually exclusive. The Board's jurisprudence indicates however that these two statutory provisions may meet or come together when the Board must determine whether the movement or transfer by a "key person" results in "common control or direction" within the meaning of subsection 1(4) of legally separate entities.

80. Once again the Board's decisions make it clear that the determination of whether there is common control or direction is dependent on the facts. Thus in *Inplant Contractors Inc.*, *supra*, the Board referred to *Jen-Ry Utility*, *supra*, stating:

56. In the present case, we are satisfied that the first two criteria are met. With respect to the third, in *Jen-Ry Utility Contracting Company Limited*, *supra*, the Board discussed the meaning of having "control" or "direction" of a company for the purposes of section 1(4):

16. All of these cases make it clear that the test for "control" under section 1(4) of this Act envisions the ultimate power to "call the shots" where necessary, as counsel for the respondent put it, with respect to the labour relations of the two enterprises, and not simply the authority and responsibility to direct the activities of employees in the field. Were it otherwise, a totally independent and established company hiring the manager of field services from another company would inevitably find itself in the position of being a "related employer" for the purposes of the *Labour Relations Act*. Rather, we accept the submission of the respondent that the section contemplates a point of central decision-making control with the ultimate power to, for example, say "yes" or "no" to a wage proposal from the union for both entities. Such power, as the Board cases show, may come simply from the legal relationship between the two entities, (e.g., *Great Atlantic & Pacific Company Limited*, *A & P Drug Mart Limited*, [1981] OLRB Rep. March 285) or from a total lack of independence in practical or economic terms, (e.g. *J. H. Normick, Foley*, *supra*, and even *Brant Erecting & Hoisting*, [1980] OLRB Rep. July 945,) or it may come from a combination of the two, (*Kennedy Lodge*, *supra*, *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214).

57. Usually, the existence of common shareholders, directors or officers is an indicia of common control and direction. In a small business, in particular, it is not surprising to find that where

one or two persons constitute the ownership, directorship or executive, these persons also hold the authority to “call the shots”. On the other hand, it is also not unusual to find persons occupying the positions of directors or officers in a corporation who do not in fact hold the ultimate power to make decisions affecting labour relations. Thus, the Board looks beyond the paper structure of a company to determine where the real power to make labour relations decisions resides. In some cases, the Board has found companies which do not share common shareholders, directors and officers to be under common control and direction: see, for instance, *Widcor Limited*, *supra* and *Metropolitan Toronto Condominium Corporation #880*, [1992] OLRB Rep. Dec. 1145.

81. The focus on the facts has caused the Board to conclude that in some instances the movement of key persons to a new entity did constitute common control or direction with respect to associated or related activities, although that movement did not necessarily fall within the application of section 64 of the Act (See for example *Ably Concrete Floor*, *supra*; *Kepic Wrecking Inc.*, *supra*; *Steeles Electric*, *supra*, *Warren Steeplejacks Limited*, *supra*; *Kent Acoustics Limited*, *supra*; *Ian Somerville Construction Ltd.*, *supra*; *Douglas MacDonald Development Corporation*, *supra*).

82. In other instances it was found that there was no common direction or control with respect to associated or related activities notwithstanding the transfer of a key person, or alternatively the Board determined that a section 64 declaration made it unnecessary to decide the issue (See *Deluxe Electrical Contractor Ltd.*, *supra*; *Merit Contractors of Niagara*, *supra*; *Jen-Ry Utility Contracting Limited*, *supra*; *Rivard Mechanical*, *supra*; *Inplant Contractors*, *supra*.)

83. There is nothing in the evidence to suggest that John Christman currently has any control or direction with respect to the operations of Christman and Associates, or that Russell Straus has any control or direction with respect to the operation of Tri-Corps. In the absence of the existence of any common shareholders, directors or officers as indicia of common control and direction, the only fact which would warrant a finding of common control and direction is that John Christman a person who was a “key person” at Christman and Associates is now a “key person” at Tri-Corps.

84. As indicated herein we have already determined that when John Christman left Christman and Associates in February, 1991 he was no longer a key person. He no longer had the authority to “call the shots”. By that time the real authority to make decisions, including those relating to labour relations matters, resided with Russel Straus, the president and majority shareholder of Christman and Associates (and perhaps with the other six minority shareholders whom Mr. Straus characterized as “key people”).

85. The issue then becomes whether the fact that John Christman was a key person at Christman and Associates at least until February, 1990 when he sold his shares, and his status as a “key person” at Tri-Corps more than three and a half years later can nevertheless form the basis for a finding that there is common control or direction between the associated or related activities of Tri-Corps and Christman and Associates.

86. Some of the Board’s decisions (See for example *Ian Somerville Construction Ltd.*, *supra*, *Kent Acoustics Limited*, *supra* and *Steeles Electric*, *supra*) have concluded that there was common control or direction where a key person left one entity and established a new entity later notwithstanding a hiatus of many years. Those cases however are readily distinguishable from the present as in each of those case the entity which the key person left behind ceased to exist or operate after his departure. It is difficult to envision more compelling evidence of an individual’s status as a “key person” with a company than the fact that the company ceases to operate when the key person is no longer associated with it. In those circumstances, when the key person returns at some later point in time to revive a business which has been dormant or non-operating during his

absence, it is much more apparent that the key person is the "link" which establishes, for labour relations purposes, the common control and direction between the associated or related activities of the separate entities (which are not at that point operating simultaneously).

87. Those are not the facts of the present case. There is a significant hiatus between the time John Christman left Christman and Associates or ceased to be a key person at Christman and Associates and the emergence of Tri-Corps *during which Christman and Associates continued to grow and prosper both in terms of the number of employees it employed and its sales volume in the millwright and rigging department*. Just as this fact detracts from a finding that there has been a sale of a business because John Christman was not, for labour relations purposes, a key person at Christman and Associates in February, 1991, so too does this fact detract from a finding of common control and direction. It is not sufficient to say that at one point in time a person who is "key" in a newly formed company was also "key" in a former unionized company. The Board must have regard to the totality of the evidence. In this case that evidence includes not only the fact that Mr. Christman was no longer a "key person" at Christman and Associates when his employment was terminated in February 1991, but also the fact of the hiatus and the intervening events, and the circumstances which existed at Christman and Associates during that hiatus.

88. This is not a case where there is no hiatus between John Christman's departure from Christman and Associates and his re-emergence at Tri-Corps. shortly thereafter. There is more than two and a half years between these two events during which John Christman worked for another employer unrelated to Christman and Associates, and during which Christman and Associates continued to operate and grow. Neither is this simply a case where a key person leaves a business and the next day establishes a new business in competition with his former employer. The facts of those types of cases and the issue of common control and direction may be much more difficult to determine. In the end result each case does indeed turn upon its own peculiar facts. A hiatus period may not always be determinative of the issue. In this case however, having regard to the totality of the evidence, we are satisfied that the third criteria for a common employer declaration - namely that there be common control or direction - is not present.

89. Finally, we note that there has not been any erosion of the trade union's bargaining rights. It is true that the trade union need not necessarily wait until actual erosion has been demonstrated to have its bargaining rights protected by a common employer declaration. On the evidence before the Board however any "erosion" which has or which may potentially occur arises not because associated or related businesses or activities are or have been carried out under common control and direction, but because of competition by a separate, newly established parallel business.

90. This application is therefore dismissed.

COURT PROCEEDINGS

3767-92-U (Court File No. 403/94) The Canadian Red Cross Society (Ontario Division), Applicant v. Ontario Labour Relations Board and the Service Employees International Union, Locals 204 and 532, Respondents

Employer - Interference in Trade Unions - Intimidation and Coercion - Judicial Review - Settlement - Stay - Strike - Strike Replacement Workers - Unfair Labour Practice - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under section 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the Act - Red Cross applying for judicial review on ground that subject matter of Board's unfair labour practice finding had been settled by parties and withdrawn - Red Cross seeking stay of Board's decision pending determination of judicial review application - Stay application dismissed

Board decision reported at [1994] OLRB Rep. Jan. 34.

Ontario Court of Justice (Divisional Court), O'Brien J., October 5, 1994.

O'Brien J. (endorsement): This application for a stay of implementation of a decision of the OLRB is refused.

The high standard to be met in such an application is outlined in *Sobeys v. UFCW* (1993) 12 OR 3d 157. (Div. Ct.) Steele J.

I am not persuaded that standard is met in this matter.

Given this Court will hear an application for Judicial Review on December 6/94 it is unnecessary and probably unwise to deal with this application in detail.

I note the OLRB heard 20 days evidence on these complaints.

There was a bifurcated hearing and final submissions made to the OLRB in May 93.

The strike which had been ongoing since March 93 was eventually settled in June of that year. Minutes of settlement were arrived at. Those minutes dealt with the complaints which had been lodged with the OLRB. The minutes are found at tab H of Vol. 1 of the application record and provided some of the charges against the applicant were withdrawn, however the following were not:

-- the replacement worker issue, or the unfair labour practice charges relating to the alleged use of replacement workers upon which the OLRB has already heard argument"--

The OLRB released its decision on January 10/94.

The applicant applied for a reconsideration and also alleged one of the issues on which the OLRB had ruled had been withdrawn.

It was apparent there was a difference between the parties as to the terms of a settlement agreement.

The OLRB received full written submissions from both parties and then released its second decision May 26/94.

That decision rejected most, if not all the arguments raised on the application to stay. The OLRB rejected those submissions.

Paragraph 22 of that decision contains the conclusions on the reconsideration.

It is unnecessary to deal with the matter in further detail and I am not satisfied the stay should be granted.

Application dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2588-93-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Superior Petroleum Maintenance Ltd. (Respondent)

Unit: "all carpenters and carpenters apprentices in the employ of Superior Petroleum Maintenance Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters apprentices in the employ of Superior Petroleum Maintenance Ltd. in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3832-93-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Ramde Industries Inc. (Respondent)

Unit: "all journeymen Sheet Metal Workers and registered apprentices in the employ of Ramde Industries Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen Sheet Metal Workers and registered apprentices in the employ of Ramde Industries Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3870-93-R: Association of Allied Health Professionals: Ontario (Applicant) v. Bruce-Grey-Owen Sound Health Unit (Respondent)

Unit: "all employees of Bruce-Grey-Owen Sound Health Unit in Bruce and Grey Counties, save and except supervisors, persons above the rank of supervisor, office and clerical staff, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of February 8, 1994" (34 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

4176-93-R: The Canadian Union of Educational Workers (Applicant) v. The University of Guelph (Respondent) v. Maura Dube (Intervener)

Unit #1: "all graduate teaching assistants, graduate service assistants employed in work directly related to the academic enterprise, and undergraduate teaching assistants, regularly employed at The University of Guelph in the City of Guelph for not more than 24 hours per week or less in teaching-related duties, including but not limited to preparing and conducting tutorials, laboratories and seminars, grading assignments, reports and examinations, save and except: persons holding full-time and part-time academic appointments at any rank including contractually-limited term appointments; persons employed under contract as sessional lecturers; persons employed in the School of Continuing Education, or persons employed in courses intended primarily for students who are not registered in a degree-credit programme; persons providing non-credit instruction in the Department of Athletics; persons paid exclusively through grant funding from sources other than the employer; persons engaged by reason of professional status or unique qualifications to give occasional or guest lectures or seminars, making up part of a course offered in a degree-credit programme; persons who exercise managerial functions or who are employed in a confidential capacity in matters related to labour relations; and persons covered by collective agreements or subsisting bargaining relationships between the

employer and other trade unions as of the date hereof" (113 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see Bargaining Agents Certified subsequent to a Pre-Hearing vote)

4297-93-R: C.E.P. Communications, Energy and Paperworkers Union of Canada (Applicant) v. E. B. Eddy Forest Products Ltd., Espanola Division (Respondent)

Unit: "all security guards employed by E.B. Eddy Forest Products Ltd., Espanola Division in the Town of Espanola, save and except the Safety and Security Co-ordinator and persons above the rank of Safety and Security Co-ordinator" (15 employees in unit) (*Having regard to the agreement of the parties*)

4427-93-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. The Chatham Daily News, a Division of Thomson Newspapers Company Limited (Respondent)

Unit: "all employees of the Chatham Daily News, a division of Thomson Newspapers Company Limited, in the County of Kent, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of the Ontario Labour Relations Act" (80 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0088-94-R: Canadian Union of Public Employees (Applicant) v. Essex Region Conservation Authority (Respondent)

Unit: "all employees of the Essex Region Conservation Authority in the Region of Essex, save and except General Manager, persons above the rank of General Manager, Curator, Executive Secretary, Senior Water Management Technician, and Park Superintendent" (28 employees in unit) (*Having regard to the agreement of the parties*)

0133-94-R: Labourers' International Union of North America, Local 493 (Applicant) v. Nor-Eng Construction and Engineering Inc. (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener)

Unit: "all construction labourers, carpenters and carpenters' apprentices and all persons engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the employ of Nor Eng Construction & Engineering Inc. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0232-94-R: North Bay Newspaper Guild, Local 241, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. The North Bay Nugget, a division of Southam Inc. (Respondent)

Unit: "all employees of The North Bay Nugget, A Division of Southam Inc. regularly employed for not more than twenty-four hours per week and all students, in the City of North Bay and the Town of Sturgeon Falls, save and except the persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3) of the Labour Relations Act" (52 employees in unit) (*Clarity Note*)

0403-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. 1027560 Ontario Limited, c.o.b. as F.I. Construction, Paving, Trucking (Respondent) v. The Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all truck drivers in the employ of 1027560 Ontario Limited, c.o.b. as F.I. Construction, Paving, Trucking in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all truck drivers in the employ of 1027560 Ontario Limited, c.o.b. as F.I. Construction, Paving, Trucking in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1096-94-R: Canadian Union of Public Employees (Applicant) v. The Brotherhood Foundation c.o.b as The Wexford (Respondent)

Unit: “all employees of the Brotherhood Foundation c.o.b. as The Wexford in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, dietitian, and office and clerical employees” (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1114-94-R: International Ladies Garment Workers Union (Applicant) v. Delta Child Care Network of Ontario (Respondent)

Unit: “all employees of Delta Child Care Network of Ontario in the Municipality of Metropolitan Toronto, save and except Executive Coordinator, persons above the rank of Executive Coordinator, Office Manager, Children’s Programs Team Leader and Students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*)

1340-94-R: International Association of Bridge, Structural and Ornamental Iron Workers Iron Workers District Council of Ontario (Applicant) v. Webco Crane & Hoist Inc. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of Webco Crane & Hoist Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of Webco Crane & Hoist Inc. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1389-94-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. O. J. Gaffney Limited (Respondent)

Unit: “all construction labourers in the employ of O. J. Gaffney Limited in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1483-94-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Pipe-All Plumbing & Heating Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Pipe-All Plumbing & Heating Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Pipe-All Plumbing & Heating Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson” (3 employees in unit)

1551-94-R: United Steelworkers of America (Applicant) v. Consumers Distributing (Respondent)

Unit: “all employees of Consumers Distributing Inc. located at 629 Markham Road, in the Municipality of Metropolitan Toronto, save and except assistant manager and persons above the rank of assistant manager” (19 employees in unit) (*Having regard to the agreement of the parties*)

1654-94-R: The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada Local 105 London, Ont. (Applicant) v. Premier Operating Corporation Limited (Respondent)

Unit: “all projectionist staff of Premier Operating Corporation Limited employed at the Mustang Drive-In

Theatres One and Two, situated at RR #7, London, save and except Manager and persons above the rank of Manager” (5 employees in unit) (*Having regard to the agreement of the parties*)

1670-94-R: Canadian Union of Public Employees (Applicant) v. Kerry’s Place (Melanie’s Place Group Home) (Respondent)

Unit: “all employees of Kerry’s Place (Melanie’s Place Group Home) in the Township of Huntington and the Municipality of Tweed, save and except Secretary to the Program Director, Assistant Program Director and persons above the rank of Assistant Program Director” (41 employees in unit) (*Having regard to the agreement of the parties*)

1671-94-R: The Canadian Union of Public Employees (Applicant) v. Kids Come First Child Care Centre of Vaughan (Respondent)

Unit: “all employees of Kids Come First Child Care Centre of Vaughan in the City of Vaughan, save and except Assistant Executive Director and persons above the rank of Assistant Executive Director” (9 employees in unit) (*Having regard to the agreement of the parties*)

1689-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-CANADA) (Applicant) v. Accucaps Industries Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of Accucaps Industries Limited in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (86 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see Applications for Certification Dismissed without vote)

1715-94-R: The Canadian Union of Public Employees - Local 1281 (Applicant) v. Neil-Wycik Co-operative College Incorporated (Respondent)

Unit: “all employees of Neil-Wycik Co-operative College Incorporated in the Municipality of Metropolitan Toronto, save and except the General Manager, persons above the rank of General Manager, the Maintenance Manager, the Hotel Manager, the Security Director, seasonal summer employees, non-permanent part-time security and maintenance employees” (9 employees in unit)

1725-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Benfal Developments Inc. and Tesmar Developments Inc. (Respondent)

Unit: “all construction labourers in the employ of Benfal Developments Inc. and Tesmar Developments Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1728-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Cashway Building Centres Inc. (Respondent)

Unit: “all employees of Cashway Building Centres Inc. in the City of Windsor, save and except Assistant Forepersons and persons above the rank of Assistant Foreperson” (42 employees in unit) (*Having regard to the agreement of the parties*)

1748-94-R: International Union of Bricklayers and Allied Craftsmen Local #20 (Applicant) v. G & C Construction (Respondent)

Unit: “all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of G & C Construction in the industrial, commercial and institutional sector of the construction industry in the

Province of Ontario, and all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of G & C Construction in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1757-94-R: United Steelworkers of America (Applicant) v. Citicom Inc. (Respondent)

Unit: "all employees of Citicom Inc. at its location at 50 Rideau Street in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, security guards and control room operators" (9 employees in unit) (*Having regard to the agreement of the parties*)

1770-94-R: United Food & Commercial Workers, Local 206 chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L. - C.I.O. (Applicant) v. Minden Manor Motor Inn, Ltd. (Respondent)

Unit: "all employees of Minden Manor Motor Inn, Ltd. in the Town of Simcoe, save and except the Head Chef, Controller, Executive Assistant, Head Fitness Clerk and persons above the rank of Head Chef, Controller, Executive Assistant and Head Fitness Clerk" (46 employees in unit) (*Having regard to the agreement of the parties*)

1791-94-R: Canadian Union of Public Employees - Local 1281 (Applicant) v. Counterpoint; A Resource Centre for Global Analysis (Respondent)

Unit: "all employees of Counterpoint; A Resource Centre for Global Analysis in the Municipality of Metropolitan Toronto, save and except Manager and persons above the rank of Manager" (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1795-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent)

Unit: "all employees of Cineplex Odeon Corporation (Kanata Town Centre Cineplex) in the Regional Municipality of Ottawa-Carleton, save and except Assistant Manager and persons above the rank of Assistant Manager and those covered by a subsisting collective agreement between IATSE Local 27 and the responding party" (10 employees in unit) (*Having regard to the agreement of the parties*)

1798-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. The Sheeting Edge Co. Ltd. (Respondent)

Unit: "all employees of The Sheeting Edge Co. Ltd. working at 690 Gana Court in the City of Mississauga, save and except supervisory personnel, persons above the rank of supervisory personnel, office and sales staff" (37 employees in unit) (*Having regard to the agreement of the parties*)

1799-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: "all employees of Hallmark Housekeeping Services Inc. at 5 and 7 Concorde Place, in the Municipality of Metropolitan Toronto, save and except foreperson and persons above the rank of foreperson" (5 employees in unit) (*Having regard to the agreement of the parties*)

1800-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at Windemere Manor and U.W.O. Research, 100 and 200 Collip Circle, in the City of London, save and except forepersons, persons above the rank of foreperson, office, sales and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

1802-94-R: International Brotherhood of Electrical Workers (Applicant) v. Association for Persons with Physical Disabilities of Windsor and Essex County (Respondent)

Unit: "all employees of the Association for Persons with Physical Disabilities of Windsor and Essex County, in the City of Windsor, save and except Co-ordinators and Assistant Supervisors and persons above the rank of Co-ordinator and Assistant Supervisor, confidential secretaries, Bookkeeper, and persons already covered by the certificate of the Board dated June 15, 1994 (OLRB File #3499-93-R)" (50 employees in unit) (*Having regard to the agreement of the parties*)

1821-94-R: Graphic Communications Union, Local 41M (Applicant) v. The Ottawa Citizen, a Division of Southam Inc. (Respondent)

Unit: "all pressroom cleaners of The Ottawa Citizen, a Division of Southam Inc. in the City of Ottawa, save and except forepersons and persons above the rank of foreperson" (4 employees in unit) (*Having regard to the agreement of the parties*)

1832-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Keanall Industries Inc. (Respondent)

Unit: "all employees of Keanall Industries Inc. at 6450 Vipond Road in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (63 employees in unit) (*Having regard to the agreement of the parties*)

1834-94-R: United Steelworkers of America (Applicant) v. Marchelino Restaurants Ltd. c.o.b. as Marchelino Restaurants (Respondent)

Unit: "all employees of Marchelino Restaurants Ltd. c.o.b. as Marchelino Restaurants in the City of Ottawa, save and except District Manager, Store Manager, Assistant Manager, Floor Manager, Bar Manager and persons above the rank of District Manager, Store Manager, Assistant Manager, Floor Manager, Bar Manager and office and clerical staff" (85 employees in unit) (*Having regard to the agreement of the parties*)

1909-94-R: Christian Labour Association of Canada (Applicant) v. The Barrie & District Association for People with Special Needs (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of The Barrie & District Association for People With Special Needs employed in the Adult Day Services Program in the City of Barrie, save and except supervisors, persons above the rank of supervisor, office, clerical and administrative staff and senior instructor" (45 employees in unit) (*Having regard to the agreement of the parties*)

1932-94-R: Canadian Union of Public Employees (Applicant) v. Victorian Order of Nurses Windsor-Essex County Branch (Respondent)

Unit: "all employees of the Victorian Order of Nurses Windsor-Essex County Branch in Windsor and Essex County, save and except supervisors, persons above the rank of supervisor and persons for whom a trade union held bargaining rights as of August 31, 1994" (4 employees in unit) (*Having regard to the agreement of the parties*)

1934-94-R: Service Employees Union, Local 663 (Applicant) v. Lennox and Addington Resources for Children (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Lennox and Addington Resources for Children in the Village of Camden, save and except Supervisors and Administrative Assistants and persons above the ranks of Supervisor and Administrative Assistant" (4 employees in unit) (*Having regard to the agreement of the parties*)

1954-94-R: National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW-Canada) (Applicant) v. Custom Racks Limited (Respondent)

Unit: "all employees of Custom Racks Limited in the Town of Whitby, save and except supervisors, persons

above the rank of supervisor, office, clerical and sales staff" (62 employees in unit) (*Having regard to the agreement of the parties*)

1955-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Cambridge Contract Management Inc. (Respondent)

Unit: "all employees of Cambridge Contract Management Inc. at Edinburgh Care Centre in the City of Guelph, save and except registered and graduate nurses, supervisors and persons above the rank of supervisor" (6 employees in unit) (*Having regard to the agreement of the parties*)

1976-94-R: Ontario Public Service Employees Union (Applicant) v. Community Occupational Therapists and Associates (Respondent)

Unit: "all employees of the Community Occupational Therapists and Associates in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager, Occupational Therapists, office and clerical staff and students employed on a practicum placement as part of a school, college or university training program" (67 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

1989-94-R: Christian Labour Association of Canada (Applicant) v. Versa Services Ltd. (Respondent)

Unit: "all employees of Versa Services Ltd. in its Food Service Operation at 1860 Lawrence Avenue East in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (29 employees in unit) (*Having regard to the agreement of the parties*)

2003-94-R: United Steelworkers of America (Applicant) v. Peel Paper Products Ltd. (Respondent)

Unit: "all employees of Peel Paper Products Ltd. in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (40 employees in unit) (*Having regard to the agreement of the parties*)

2008-94-R: Ontario Public Service Employees Union (Applicant) v. Bruce-Grey-Owen Sound Health Unit (Respondent)

Unit: "all office and clerical employees of the Bruce-Grey-Owen Sound Health Unit in the Counties of Bruce and Grey and the City of Owen Sound, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary, Administrative Secretary/Accounting Assistant, Computer Support Analyst, Accountant and employees in bargaining units for which any trade union held bargaining rights as of September 7, 1994" (54 employees in unit) (*Having regard to the agreement of the parties*)

2014-94-R: United Steelworkers of America (Applicant) v. Security Management Services Div. Halo Security Inc. (Respondent)

Unit: "all employees of Security Management Services Div. Halo Security Inc. at 7601 Bathurst Street in Thornhill, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

2066-94-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. T. and S. Electric (93) Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of T. and S. Electric (93) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of T. and S. Electric (93) Inc. in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2116-94-R: The Association of Allied Health Professionals: Ontario (Applicant) v. Pembroke Civic Hospital (Respondent)

Unit: "all paramedical employees of the Pembroke Civic Hospital in the City of Pembroke, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of September 14, 1994" (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

4176-93-R: The Canadian Union of Educational Workers (Applicant) v. The University of Guelph (Respondent) v. Maura Dube (Intervener)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: "all persons employed under contract at The University of Guelph as sessional lecturers employed to teach in University degree credit courses, save and except: persons holding full-time and part-time academic appointments at any rank including contractually-limited term appointments of 12 months or more; persons employed in the School of Continuing Education, or persons employed in courses intended primarily for students who are not registered in a degree-credit programme; persons providing non-credit instruction in the Department of Athletics; persons paid exclusively through grant funding from sources other than the employer; persons engaged by reason of professional status or unique qualifications to give occasional or guest lectures or seminars, making up part of a course offered in a degree-credit programme; persons who exercise managerial functions or who are employed in a confidential capacity in matters related to labour relations; post-doctoral Fellows engaged in teaching to the extent that such teaching is a requirement of their fellowship; retired faculty who, prior to their retirement, had an academic appointment at The University of Guelph; and persons covered by collective agreements or subsisting bargaining relationships between the employer and other trade unions as of the date hereof" (778 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	890
Number of persons who cast ballots	414
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	219
Number of ballots marked against applicant	193

0773-94-R: Canadian Union of Public Employees (Applicant) v. Central Neighbourhood House Association (Respondent)

Unit: "all employees of Central Neighbourhood House Association in the Municipality of Metropolitan Toronto, save and except Managers, those above the rank of Manager and Accounting Assistant, and any persons for whom a trade union held bargaining rights as of June 2, 1994" (129 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	127
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names not on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	6

1545-94-R: United Steelworkers of America (Applicant) v. The Hudson's Bay Company (Respondent)

Unit: "all full-time security guards at the Bay Store at 3030 Howard Avenue, in the City of Windsor, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed on a co-opera-

tive program with a school, college or university" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

1559-94-R: Canadian Union of Public Employees (Applicant) v. Board of Management of The Metropolitan Toronto Zoo (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

Unit: "all employees of the Metropolitan Toronto Zoo in the Municipality of Metropolitan Toronto performing Security and Safety or Communications Control Centre related duties for the Metropolitan Toronto Zoo, save and except Supervisors, persons above the rank of Supervisor and any employee for whom a trade union held bargaining rights on August the 2nd, 1994," (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	0

1639-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Public Utilities Commission of the Town of Paris (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all employees of The Public Utilities Commission of the Town of Paris, save and except foreman, those above the rank of foreman and office staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	6

1754-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Hydro Electric Commission of the Town of Orangeville (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all employees of The Hydro Electric Commission of the Town of Orangeville, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	5

Applications for Certification Dismissed Without Vote

2740-93-R: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the

Plumbing and Pipefitting Industry of the United States and Canada, Local Union 819 (Applicant) v. 655270 Ontario Inc., c.o.b. as Eastern Welding (Respondent)

1584-94-R: United Steelworkers of America (Applicant) v. Marchelino Restaurants Ltd. c.o.b. as Movenpik (Respondent) (97 employees in unit)

1689-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-CANADA) (Applicant) v. Accucaps Industries Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: “all employees of Accucaps Industries Limited in the City of Windsor, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff” (13 employees in unit)

1765-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Armada Toolworks Limited (Respondent) v. Group of Employees (Objectors) (110 employees in unit)

1845-94-R: United Steelworkers of America (Applicant) v. John Mara & Sons Ltd. (Respondent) v. Group of Employees (Objectors)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1716-94-R: United Steelworkers of America (Applicant) v. Con Cast Pipe Limited (Respondent)

Unit #1: “all employees of Con Cast Pipe Limited in the County of Wellington, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (84 employees in unit)

Number of names of persons on revised voters' list	84
Number of persons who cast ballots	82
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	80
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	54
Number of ballots segregated and not counted	2

1843-94-R: Graphic Communications International Union Local N-1 (Applicant) v. The Print Key Inc. (Respondent)

Unit #1: “all employees of The Print Key Inc. in the City of Mississauga, save and except for non-working forepersons, persons above the rank of non-working foreperson, office, clerical and sales staff” (47 employees in unit)

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1145-94-R: United Steelworkers of America (Applicant) v. E.S.F. Limited c.o.b. as Tim Hortons (Respondent)

Unit: “all employees of ESF Limited c.o.b. as Tim Hortons at 1545 Woodroffe Avenue in the City of Nepean, save and except Assistant Manager and persons above the rank of Assistant Manager and Office and Clerical Staff” (45 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	4

1628-94-R: Ontario Sheet Metal Workers' & Roofers' Conference; Sheet Metal Workers' International Association Local 30 (Applicants) v. Midhurst Roofing Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all roofing personnel in the employ of Midhurst Roofing Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all roofing personnel in the employ of Midhurst Roofing Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except persons employed in the industrial, commercial and institutional sector of the construction industry, non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	2

1645-94-R: Graphic Communications International Union, Local 500M (Applicant) v. Eastend Bindery Limited (Respondent)

Unit: “all employees of Eastend Bindery Limited in the Municipality of Metropolitan Toronto, save and except non-working foremen, persons above the rank of non-working foremen, office, clerical and sales staff and students employed during the school vacation period” (56 employees in unit)

Number of names of persons on revised voters' list	56
Number of persons who cast ballots	50
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	41

1664-94-R: Teamsters Local Union 938 (Applicant) v. VytalBase T-R, A Division of Brambles Canada Inc. (Respondent)

Unit: “all employees of VytalBase T-R, A Division of Brambles Canada Inc., at 77 East Don Roadway, North York, save and except supervisors, persons above the rank of supervisor, office, sales and technical staff” (25 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	24

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

3312-90-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Donia Aluminum & Roofing Ltd. (Respondent)

1524-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Chubb Security Canada Inc. (Respondent) v. International Brotherhood of Electrical Workers Local 636 (Intervener)

1734-94-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Polcon Tile Constructive Interiors Ltd. (Respondent)

1878-94-R: Canadian Union of Public Employees - Local 1281 (Applicant) v. Radio Carleton Incorporated (Respondent)

1907-94-R: The Graphic Communications International Union Local N-1 (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent)

1924-94-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. R & R Mechanical Contractors Inc. (Respondent)

1987-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Trijan Industries (Respondent)

2016-94-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. 826673 Ontario Inc. c.o.b. as LCL Contracting (Respondent)

2019-94-R: Labourers' International Union of North America, Local 491 (Applicant) v. 826673 Ontario Inc., c.o.b. as L.C.L. Contracting (Respondent)

2117-94-R: IWA-Canada (Applicant) v. Queen's Landing Inn (Respondent)

2120-94-R: Communications, Energy and Paperworkers Union of Canada Local 333 (Applicant) v. Chubb Security Canada Inc. (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

2171-94-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of New Tecumseth Public Library Board (Respondent)

2225-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Calsper Developments Inc. (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

0231-94-R: North Bay Newspaper Guild, Local 241, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. The North Bay Nugget, a division of Southam Inc. (Respondent) (*Granted*)

0540-94-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Midland Public Utilities Commission (Respondent) (*Granted*)

1339-94-R: Canadian Union of Public Employees and its Local 2357 (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent) (*Granted*)

1723-94-R: Employees' Association, St. Mary's of the Lake Hospital (Applicant) v. St. Mary's of the Lake Hospital (Respondent) (*Granted*)

1727-94-R: The Toronto Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

1796-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent) (*Granted*)

1803-94-R: International Brotherhood of Electrical Workers (Applicant) v. Association for Persons with Physical Disabilities of Windsor and Essex County (Respondent) (*Granted*)

1822-94-R: Graphic Communications Union, Local 41M (Applicant) v. The Ottawa Citizen, a Division of Southam Inc. (Respondent) (*Granted*)

1836-94-R: Association of Allied Health Professionals: Ontario (Applicant) v. St. Mary's of the Lake Hospital (Respondent) (*Granted*)

1908-94-R: Graphic Communications International Union, Local N-1 (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent) (*Withdrawn*)

1935-94-R: Service Employees Union, Local 663 (Applicant) v. Lennox and Addington Resources for Children (Respondent) v. Group of Employees (Objectors) (*Granted*)

1953-94-R: International Brotherhood of Electrical Workers Local 636 (Applicant) v. Napanee Hydro Electric Commission (Respondent) (*Withdrawn*)

2087-94-R: Victorian Order of Nurses Windsor-Essex County Branch (Applicant) v. Canadian Union of Public Employees (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3586-92-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. The Second Cup Ltd. and David and Janice Heasley (Respondents) (*Endorsed Settlement*)

2095-93-R: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Royal Homes Limited, Canadiana Cabinets Limited (Respondents) (*Withdrawn*)

3344-93-R: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Premdor Inc. and 943340 Ontario Limited (Respondents) (*Withdrawn*)

3468-93-R: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. J.S. Electric (1989) Ltd., J.S. Industrial Sales & Service Ltd., J.S Industrial Sales & Service (1993) Inc., Industrial Electrical Contractors Limited (Respondents) (*Endorsed Settlement*)

3767-93-R: Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates (Applicant) v. United Shelters Limited c.o.b. as Lisgar Construction Company, Known Construction Company Limited, 281981 Ontario Limited, Worldland Developments Inc. (Respondents) (*Terminated*)

4002-93-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, International Brotherhood of Painters and Allied Trades, Local 200 (Applicant) v. Killarney Glass & Aluminum Ltd., 882709 Ontario Inc. c.o.b. as Killarney Glass (1992) (Respondents) (*Withdrawn*)

4492-93-R: Ontario Nurses' Association (Applicant) v. West Lincoln Memorial Hospital and, West Lincoln Multilevel Health Facility (Respondents) v. Niagara Health Care and Service Workers Union Local 302, Christian Labour Association of Canada (Intervener) (*Dismissed*)

0425-94-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. M.E.M. Contracting and Jomar Drywall Inc. (Respondents) (*Granted*)

0829-94-R; 0891-94-R: United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation Local 675, Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bradscot Construction Limited, Bradscot Western Limited and Bradscot Northern Limited, Bradscot (MCL) Ltd. (Respondents); Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Local 597 (Applicant) v. Bradscot Construction Limited, Bradscot Northern Limited, Bradscot Western Limited, Bradscot (MCL) Ltd. (Respondents) (*Endorsed Settlement*)

0993-94-R: Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. CMP Group (1985) Limited, Toronto Linen Inc. c.o.b. as Toronto Linen Rental, Commercial Laundry & Linen Supply Ltd., CMP Commercial, CMP Commercial Inc. (Respondents) (*Endorsed Settlement*)

1166-94-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Cote and Ryde Construction Ltd., 489 Sussex Properties Limited (Respondents) (*Withdrawn*)

1268-94-R: The Ontario Secondary School Teachers' Federation (Applicant) v. Norfolk County Board of Education, Rick Smith, Robert Scott and Donald Drinkwater (Respondents) v. Group of Employees (Objectors) (*Endorsed Settlement*)

1334-94-R: International Union of Bricklayers and Allied Craftsmen, Local 10 and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. 789256 Ontario Ltd. c.o.b. as Jim's Masonry, A.A. Masonry (Respondents) (*Withdrawn*)

1442-94-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Hank Van Aspert c.o.b. as The Tool Shed (Electric-Service), Electri-Serve Windsor Limited (Respondents) (*Endorsed Settlement*)

1466-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. S & V Electric Ltd., Ultrateck Electric Inc., 998229 Ontario Ltd. c.o.b. as Globe Electric (Respondents) (*Endorsed Settlement*)

1581-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Irsun Mechanical Ltd. and Gus Mechanical Engineering Inc. (Respondents) (*Endorsed Settlement*)

1636-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Var-Cor Portable Welding, Var-Cor Steel Erection Ltd. Ralph Gordon Corbett (Respondents) (*Endorsed Settlement*)

1647-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Maplewood Carpentry Inc. and Super/M's Contracting Limited (Respondents) (*Endorsed Settlement*)

2035-94-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Monte Lago Masonry Ltd. and Lago Masonry Ltd. (Respondent) (*Endorsed Settlement*)

SALE OF A BUSINESS

3586-92-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. The Second Cup Ltd. and David and Janice Heasley (Respondents) (*Endorsed Settlement*)

2095-93-R: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Royal Homes Limited, Canadiana Cabinets Limited (Respondents) (*Withdrawn*)

3344-93-R: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Premdor Inc. and 943340 Ontario Limited (Respondents) (*Withdrawn*)

3468-93-R: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. J.S. Electric (1989) Ltd., J.S. Industrial Sales & Service Ltd., J.S Industrial Sales & Service (1993) Inc., Industrial Electrical Contractors Limited (Respondents) (*Endorsed Settlement*)

3767-93-R: Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates (Applicant) v. United Shelters Limited c.o.b. as Lisgar Construction Company, Known Construction Company Limited, 281981 Ontario Limited, Worldland Developments Inc. (Respondents) (*Terminated*)

4002-93-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, International Brotherhood of Painters and Allied Trades, Local 200 (Applicant) v. Killarney Glass & Aluminum Ltd., 882709 Ontario Inc. c.o.b. as Killarney Glass (1992) (Respondents) (*Withdrawn*)

0425-94-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. M.E.M. Contracting and Jomar Drywall Inc. (Respondents) (*Granted*)

0829-94-R; 0891-94-R: United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation Local 675, Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bradscot Construction Limited, Bradscot Western Limited and Bradscot Northern Limited, Bradscot (MCL) Ltd. (Respondents); Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Local 597 (Applicant) v. Bradscot Construction Limited, Bradscot Northern Limited, Bradscot Western Limited, Bradscot (MCL) Ltd. (Respondents) (*Endorsed Settlement*)

0871-94-R: United Food & Commercial Workers International Union, Locals 175 and 633 (Applicant) v. 853262 Ontario Limited carrying on business as Tony's No Frills (Respondent) (*Endorsed Settlement*)

0993-94-R: Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. CMP Group (1985) Limited, Toronto Linen Inc. c.o.b. as Toronto Linen Rental, Commercial Laundry & Linen Supply Ltd., CMP Commercial, CMP Commercials Inc. (Respondents) (*Endorsed Settlement*)

1166-94-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Cote and Ryde Construction Ltd., 489 Sussex Properties Limited (Respondents) (*Withdrawn*)

1334-94-R: International Union of Bricklayers and Allied Craftsmen, Local 10 and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. 789256 Ontario Ltd. c.o.b. as Jim's Masonry, A.A. Masonry (Respondents) (*Withdrawn*)

1442-94-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Hank Van Aspert c.o.b. as The Tool Shed (Electric-Service), Electri-Serve Windsor Limited (Respondents) (*Endorsed Settlement*)

1466-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. S & V Electric Ltd., Ultrateck Electric Inc., 998229 Ontario Ltd. c.o.b. as Globe Electric (Respondents) (*Endorsed Settlement*)

1581-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Irsun Mechanical Ltd. and Gus Mechanical Engineering Inc. (Respondents) (*Endorsed Settlement*)

1636-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Var-Cor Portable Welding, Var-Cor Steel Erection Ltd. Ralph Gordon Corbett (Respondents) (*Endorsed Settlement*)

1647-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Maplewood Carpentry Inc. and Super/M's Contracting Limited (Respondents) (*Endorsed Settlement*)

2035-94-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Monte Lago Masonry Ltd. and Lago Masonry Ltd. (Respondent) (*Endorsed Settlement*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2152-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Bay - Brampton (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2153-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Cornwall Warehousing Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2154-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Blue Line Taxi Co. Limited and any taxicab licenses and taxicabs under its direct or indirect control pursuant to but not exclusive of the section 1(4) declaration issued by the Ontario Labour Relations Board (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Balbir S. Bhangoo, Grant A. Hartley and Massoud Moyhaddam (Intervenors) (*Granted*)

2155-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. F.W. Woolworth Co. Ltd. (Part-time) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2156-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Ontario Motor League Elgin-Norfolk Club and Ontario Motor League World Wide Travel Agency (St. Thomas) Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2157-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Robert Chabot Enterprises Limited c.o.b. Centennial Construction Equipment Rentals (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2158-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Willett Foods Inc. (Respondent) v. Steve Chiarelli, Stewart W. Detenbeck, Susan Shunk, RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervenors) (*Granted*)

2159-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Vanfax Corporation, LOF Glass of Canada Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2160-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Grand & Toy Limited (Respondent) v. Retail, Wholesale and Department Store Union AFL-CIO-CLC (Intervener) (*Granted*)

2161-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. National Grocers Co. Ltd. (Respondent) v. Retail, Wholesale and Department Store Union AFL-CIO-CLC, Harry Parker (Interveners) (*Granted*)

2162-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 629434 Ontario Limited (East Huron Poultry Limited) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2163-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. IGA Glebe (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2164-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Colonial Furniture (Ottawa) Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2165-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Canteen of Canada Limited (Ontario) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2166-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. S & R Department Store (1976) Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2167-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Bay - Cedarbrae (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2168-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Kitchens of Sara Lee, Canada a Division of Sara Lee Corporation of Canada, Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2169-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Pharma Plus Drugmarts Ltd. - Orangeville (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Primrose Short (Interveners) (*Granted*)

2170-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Beatrice Foods Inc., Maple Lane Dairy Division (Respondent) v. RWDSU Dis-

trict Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2171-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Bay - Kitchener (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2172-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Gesco Warehousing and Distributing Company (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2173-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Beatrice Foods Inc., Simcoe Division (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2174-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Bay - Sherway Gardens (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2175-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. LOEB IGA Nortown (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Gerald Balazsity (Interveners) (*Granted*)

2176-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Beatrice Foods Inc., Toronto Division (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2177-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Capital Supermarkets (1988) Limited, c.o.b. as LOEB IGA Convent Glen (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Bryan Phillips (Interveners) (*Granted*)

2178-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Trans-Canada Freezers Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Bev Rilett (Interveners) (*Granted*)

2179-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Dynamic Distributors, a Division of Apple Auto Glass Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2180-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. LOEB Alfred (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Ronnie Groulx (Interveners) (*Granted*)

2181-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Beaver Lumber Company Limited Parkdale Store (Hamilton, Ontario) (Re-

spondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2182-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Laidlaw Carriers Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2183-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Marsh Food Services (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Mike Carew (Intervenors) (*Granted*)

2184-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Murphy Distributing Ltd. Murphy Distributing (Sarnia) Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Rob Freeman and Richard Nardone (Intervenors) (*Granted*)

2185-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions, 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2186-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. National Grocers Co. Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, v. Harry Lane (Intervenors) (*Granted*)

2187-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. National Grocers Co. Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2188-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2189-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Pharma Plus Drugmarts Ltd. with respect to its stores in the Regional Municipality of Ottawa, Carleton (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Marylin Astley, Kim Lavallee et al (Intervenors) (*Granted*)

2190-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. VS Services Ltd. (Food Management Services), Cami Automotive Inc., Ingersoll, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2191-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Nutritional Management Services (1991) Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2192-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. Wendy's Restaurants of Canada Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2193-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. World's Biggest Book Store, a division of Coles Book Stores Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2194-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. No Frills Franchise Stores (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2195-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. The Millcroft Inn Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2196-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Robert Yan Drugs Ltd. c.o.b. Shopper's Drug Mart (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2197-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. The Kitchener-Waterloo Labour Association Incorporated (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2198-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Dougherty's Meats Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2199-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. Local 1520 C.A.W. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. Canada) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2200-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Hully Gully (London) Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2201-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. G.B. Catering (1991) Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2202-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. Sirch Holdings Inc. Carrying on Business as The Ridout Tavern Complex (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2203-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. K-W Food Services (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Mary Anne O'Driscoll (Interveners) (*Granted*)

2204-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Silcorp Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2205-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Canada Catering Co. Limited at the premises of AEL Microtel Limited at Brockville, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2206-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Patton's Place Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2207-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Somerset Specialties Limited c.o.b. as Trent News Company (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 463, 488, 1000 and 1688 (Intervener) (*Granted*)

2208-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Restauronics Services (Revenue Building - Oshawa) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2209-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2210-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Sodexo Ltd. (Cafeteria at Labour Board) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2211-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Atlantic Packaging Products Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2212-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Brown Fine Foods (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2213-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Bay - Windsor (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2214-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. National Automobile Aerospace and Agricultural Implement Workers Union of Canada, CAW-Canada Local 27 (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2215-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Bay - Warden Woods (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2216-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. Hydon Holdings Limited c.o.b. Hy's Steak House (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2217-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Everfresh Beverages Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Ahmad Eldreih (Interveners) (*Granted*)

2218-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. 696254 Ontario Limited (c.o.b. as Notes - Alfies) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2219-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Rich Products of Canada Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2220-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Mossman's Appliance Parts Ltd. Toronto, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2221-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Canteen of Canada Limited (Ontario) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2222-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. T.R.S. Food Services Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2223-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Belarus Equipment of Canada Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers' International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2224-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Sav-A-Centre, a division of The Great Atlantic & Pacific Company of Canada, Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Gary Ross, Angela Hamilton, Hank Antoniak (Interveners) (*Granted*)

2225-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Uniondale Cheese Factory Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2226-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Sears Canada Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2227-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Hamilton Yellow Cab Company Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2228-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Seibe North Canada Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2229-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Sears Canada Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2230-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. TCC Bottling Ltd. (Renfrew) c.o.b. as Coca Cola Bottling (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2231-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Spalding Canada, A Division of Spalding & Evenflo Canada Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2232-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. T.R.S. Food Services Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2233-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. LOEB IGA Wallaceburg 708 James Street Wallaceburg, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Melanie DeBryan (Interveners) (*Granted*)

2234-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Winchester Cheese, Winchester (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488 1000 and 1688 (Intervener) (*Granted*)

2235-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Murphy Distributing Ltd. St. Catharines, Ontario, London, Ontario, Sarnia, Ontario, Windsor, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Donna-gene Nichols (Interveners) (*Granted*)

2250-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Seligman and Latz of Polo Park Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2251-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Seligman and Latz of Polo Park Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488 1000 and 1688 (Intervener) (*Granted*)

2252-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Beatrice Foods Inc. Brookside Dairy Division (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Frank Cosentino (Intervenors) (*Granted*)

2253-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 422 (Applicant) v. Bluecrest (Division of Ault Foods Limited) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488 1000 and 1688 (Intervener) (*Granted*)

2254-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Abbott Laboratories Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2255-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Baskin-Robbins, Division of Thirty One Flavors Stores, Co. of Canada, Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2256-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 422 (Applicant) v. Bluecrest (Division of Ault Foods Limited) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2257-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Wayne Pitman Ford Sales Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2258-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. World's Biggest Book Store, a division of Coles Book Stores Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2259-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. United Co-operatives of Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2260-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 422 (Applicant) v. Royal Oak Dairy, (Division of Ault Foods Limited) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2261-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of Amer-

ica, Local 414 (Applicant) v. Versa Services Ltd., and its Consumers Glass Inc. Operation in Hamilton, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2263-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Versa Services Ltd., General Motors Cafeterias, Oshawa, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2264-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Factory Carpet A Division of Colorcarpet Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2265-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Versa Services Limited at Labatts, London, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2266-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. VS Services Ltd. (Food Management Services) 3M Canada, Cafeteria, London, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2267-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. VS Services Ltd. (Food Management Services) Kelloggs Salada Cafeteria, London, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2268-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Versa Services Ltd. (Food Management Services) Navistar International, Chatham, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2269-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Able Atlantic Taxi (1989) Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2270-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Shirley Leishman Books Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2271-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Autostock Distribution, Division of T.C.C. International Inc. (formerly Trans Canada Auto Glass Ltd.) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2272-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 598537 Ontario Inc. c.o.b. Warner Pro Hardware (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2273-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of Amer-

ica, Local 414 (Applicant) v. Associated Toronto Taxi-Cab Co-Operative Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2274-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. 366838 Ontario Limited c.o.b. as City Wide Taxi (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2275-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. J.F. Eastwood Limited, Operating as St. Clair Paint & Wallpaper (London) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2276-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Call-A-Cab Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2277-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Beaver Foods Limited at Fanshawe College, London (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2278-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Sears Canada Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2279-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Ault Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2280-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Seligman and Latz of Polo Park Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2281-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 422 (Applicant) v. Royal Oak Dairy, A Division of Ault Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2282-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Ault Foods Ltd., Mitchell, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2283-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Beaver Lumber Company Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2284-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Jarvis Design & Display Ltd. (Respondent) v. RWDSU District Council of the

United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488 1000 and 1688 (Intervener) (*Granted*)

2285-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Versa Services Ltd., General Motors Cafeterias, Oshawa, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2286-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. 806966 Ontario Inc., c.o.b. as A-1 Taxi, 727825 Ontario Ltd. c.o.b. as Eastway Taxi (Respondents) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Hamid Dadshany, Saeed Hojjati, Mohammed Mohammed, Jihad Mohammed Ali, Walid Karazi, S. Ebrahim Hosseini, Daoud Nehme, Yahia Yahia, Mekid Admasu, Ambachew E. Yenienneh, Mulugeta Abraha, Sheik Mohamed, Abdurahman Ibrahim (Intervenors) (*Granted*)

2287-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. VS Services Ltd. (Food Management Services) Ford Cafeteria, Oakville, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2288-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Blue Line Taxi Co. Limited (Gloucester Unit) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Georges Issa, Elias Abboud, et al (Intervenors) (*Granted*)

2289-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 483 (Applicant) v. Casco Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2290-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 483 (Applicant) v. Best Foods Canada Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2291-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. ABC Taxi (Brockville) Ltd. & Safedrive Inc. c.o.b. City Cab (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2292-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. CAA Ottawa (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Chris May and Dan Hodge (Intervenors) (*Granted*)

2293-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Walfoods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2294-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 422 (Applicant) v. Royal Oak Dairy, A Division of Ault Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, and Jack Schmidt (Intervenors) (*Granted*)

2295-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Royal Doulton Canada Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2296-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Northside Dairy A Division of Ault Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2297-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Ault Foods Limited, Winchester, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2298-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Seligman and Latz of Polo Park Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2299-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Weston Bakeries Limited, Walkerton, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2300-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Seligman and Latz of Polo Park Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2301-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Seligman and Latz of Polo Park Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2302-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. 374761 Ontario Limited c.o.b. under the firm name and style of Brotherhood Mens & Boys Department Store (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2303-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Golden Mill Bakeries Limited, Hamilton, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2304-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Weston Bakeries Limited, London, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2305-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Ault Foods Limited, Mitchell, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2306-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Ault Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2307-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Royal Doulton Canada Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2308-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Ault Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2309-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Ault Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2310-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. DJ's Nepean Taxi Company Limited and the Owners Group as pursuant to the section 1(4) declaration issued by the Ontario Labour Relations Board (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2311-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Seligman and Latz of Polo Park Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2312-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Culinar Foods Inc. Toronto, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2313-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Weston Bakeries Limited, Orillia, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2314-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 488 (Applicant) v. Nestle Canada Inc. Foods Division, Chesterville Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2315-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Weston Bakeries Limited, Kitchener, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2316-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Hostess Food Products Limited, Cambridge, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2317-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Weston Bakeries Limited, Kitchener, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2318-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 488 (Applicant) v. Nestle Canada Inc. Foods Division, Chesterville Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2319-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Weston Bakeries Limited, Peterborough, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2320-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Sears Canada Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2321-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Golden Mill Bakery Limited (Hamilton, Ontario) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2322-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Robinson Cone (A Division of Dover Industries) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2323-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. The UCS Group/Division of IMASCO Retail Inc. with respect to its Convenience Division, Specialty Division and Airport & Hotel Division Stores in the Regional Municipality of Ottawa-Carleton (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2324-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. 806966 Ontario Inc. c.o.b. as A-1 Taxi, Julian Taxi Cab Ltd., and any fleet owner who owns, leases and/or controls more than one vehicle or taxi licence plate or any combination thereof (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Saeed B. Toolabi (Intervenors) (*Granted*)

2325-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Zellers Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2326-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. F.W. Woolworth Company Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2327-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. VS Services Ltd. (Food Management Division Peterborough - at Canadian Gen-

eral Electric) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2328-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. Freed Storage Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2329-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Humpty Dumpty Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2330-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Canada Bread Division of Corporate Foods Limited Oshawa, Hamilton and St. Catharines Branches (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2331-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Hostess Food Products Limited, Cambridge, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2332-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Humpty Dumpty Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2333-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. The Hostess Frito-Lay Company, London, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2395-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Associated Toronto Taxi-Cab Limited (Respondent) (*Granted*)

2396-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Diamond Taxicab Association (Toronto) Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2397-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Metro Cab Company Limited, Yellow Cab Inc., Art's Taxi Limited, PELS Investment Limited, A & A Taxi, ABC Taxi, City Wide Taxi, Go West Taxi, Northwest Taxi, and Don Mills Taxi, c.o.b. as "The Metro Cab Group of Companies" (Respondents) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2493-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Humpty Dumpty Foods Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2494-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Brick Warehouse Corporation (Respondent) v. RWDSU District Council

of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2495-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Brick Warehouse Corporation (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2496-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Brick Warehouse Corporation (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2497-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Applicant) v. Rendez-Vous Tavern (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2514-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Westway Taxi Nepean Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2515-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Union Taxi (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2516-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Blue Line Taxi Co. Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2529-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 836541 Ontario Ltd. c.o.b. as LOEB Carleton Place (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2530-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 917921 Ontario Inc. c.o.b. as Loeb Baywood (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2531-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2532-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 914089 Ontario Inc. operating under the name of LOEB I.G.A. Beaverbrook (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2533-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Nordik Windows Inc. (Respondent) v. RWDSU District Council of the United

Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2534-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Central Chevrolet Oldsmobile (London) Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2535-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 652605 Ontario Inc. c.o.b. as LOEB I.G.A. Lincoln Heights (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2536-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2537-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. L.O.F. Glass of Canada Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2538-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 895657 South Mitchell Holdings Limited c.o.b. as LOEB Club Plus Woodstock (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2539-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. National Federation of Nurses' Unions (Respondent) (*Granted*)

2540-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 978653 Ontario Inc. c.o.b. as The Connection Group (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2541-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Hershey Canada Inc., Smiths Falls, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2542-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Nivel Inc. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2543-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Commercial Bakeries Corp. Toronto, Ontario (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2544-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Sifton Properties Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2574-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Applicant) v. Beatrice Foods (Brampton Division) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2575-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Corporate Foods Limited Dempster's Bread in the City of Markham (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2576-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Can Can Food and Vending Services (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

2577-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Can Can Food and Vending Services Ltd. (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Jim Mulcahy (Interveners) (*Granted*)

SECTION 64.2 - SUCCESOR RIGHTS - FEDERAL/PROVINCIAL

1873-94-R: United Steelworkers of America (Applicant) v. Corma Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1556-94-R: Andre Esser (on behalf of all drivers & transport drivers) (Applicant) v. Bakery, Confectionery & Tobacco Workers International Union, Local 264 (Respondent) v. Dimpflmeier Bakery Limited (Intervener)

Unit: "all driver salesmen and transport drivers of Dimpflmeier Bakery Limited working at or out of the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical staff and students employed during school vacation period" (29 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	20
Number of ballots segregated and not counted	0

1591-94-R: The Employees of the Brantford Branch Red Cross Homemakers (Applicant) v. Service Employees International Union, Local 204 AFL-CIO-CLC (Respondent) v. The Canadian Red Cross Society (Ontario Division) (Intervener)

Unit: "all employees of The Canadian Red Cross Society (Ontario Division) in Brantford, save and except supervisors, persons above the rank of supervisor, office and clerical employees and persons for which any trade union held bargaining rights as of November 29, 1988" (177 employees in unit) (*Dismissed*)

1816-94-R: Rick Chandler (Applicant) v. International Ladies Garment Workers Union (Respondent) (*Dismissed*)

1844-94-R: Wayne Harris Murray Addison (Applicant) v. Canadian Merchant Service Guild (Respondent) v. The Owen Sound Transportation Company, Limited (Intervener) (*Granted*)

2045-94-R: Elizabeth Edwards, Ann Chesher, and Kim Stinson (Applicant) v. CAW Local 1987 (Respondent) v. Dowty Aerospace Peterborough (Intervener) (*Withdrawn*)

2244-94-R: Employees of Isadore Roy Limited (Applicant) v. IWA of Canada, Local 2693 (Respondent) (*Dismissed*)

REFERRAL FROM MINISTER (SECTION 109)

4430-93-M: Ontario Public Service Employees Union and its Local 365 (Applicant) v. Trent University (Respondent) (Terminated)

0814-94-M: Labourers' International Union of North America, Local 1267 (Applicant) v. Laidlaw Transit Ltd. (Respondent) (*Granted*)

2240-94-M: International Union of Woodworkers, Local 2693 (Applicant) v. Isadore Roy Lumber Limited (Respondent) (*Granted*)

APPLICATION - UNLAWFUL AGREEMENT (S.137(3))

1708-94-U: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers International Association, Local 30 (Applicant) v. Sheet Metal Workers' International Association, Local 285, Centair Systems Limited and/or #954848 Ontario Ltd., c.o.b. as Centair Systems (Respondents) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

1444-94-U: International Brotherhood of Electrical Workers' Local 636 (Applicant) v. Mississauga Hydro Electric Company (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3369-91-U: Arthur Chen (Applicant) v. Local 43 Metro Toronto Civic Employees Union CUPE Affiliate, (Respondent) v. The City of Toronto (Intervener) (*Dismissed*)

2096-93-U; 2465-93-U: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Royal Homes Limited, Canadiana Cabinets Limited (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Royal Homes Limited (Respondent) (*Withdrawn*)

2452-93-U: Bradscot Construction Limited (Applicant) v. Drywall, Acoustic Lathing and Insulation Local 675 (Respondent) (*Endorsed Settlement*)

4015-93-U: Ontario Secondary School Teachers' Federation (Applicant) v. Kent County Board of Education (Respondent) (*Withdrawn*)

4251-93-U: David DeVries (Applicant) v. Canadian Union of Public Employees, Ontario Hydro Employees' Union Local 1000 and Ontario Hydro (Respondents) (*Dismissed*)

4276-93-U: Robert Fraser Jr. (Applicant) v. International Union of Elevator Constructors Local 50 (Respondent) (*Endorsed Settlement*)

4322-93-U: Joseph J. Burke (Applicant) v. Metropolitan Toronto Civic Employee's Union Local 43 (Respondent) v. The Corporation of the City of Toronto (Intervener) (*Withdrawn*)

0001-94-U: United Food & Commercial Workers Union, Local 175 and 633 (Applicant) v. Banlake Associates Ltd. c.o.b. as Bancroft I.G.A. (Respondent) (*Endorsed Settlement*)

0203-94-U: Teamsters Local 847 Laundry & Linen Drivers and Industrial Workers (Applicant) v. CMP Group (1985) Limited, Toronto Linen Inc. c.o.b. as Toronto Linen Rental, Commercial Laundry & Linen Supply Ltd., CMP Commercial, CMP Commercials Inc. (Respondents) (*Endorsed Settlement*)

0321-94-U: Ontario Public Service Employees Union (OPSEU) on behalf of Donald Stockwood (Applicant) v. Ministry of Solicitor General and Correctional Services Metro Toronto East Detention Centre (Respondent) (*Withdrawn*)

0569-94-U: Canadian Union of Public Employees, Local 2816 (Applicant) v. The Hospital for Sick Children (Respondent) (*Dismissed*)

0735-94-U: Metropolitan Toronto Civic Employees Union, Local 43 (Applicant) v. Corporation of the City of Toronto and International Brotherhood of Electrical Workers, Local Union 353 (Respondents) v. Domenic Battaglia (Intervener) (*Withdrawn*)

0776-94-U: Gordon W. Grant (Applicant) v. The Corporation of the Township of Harvey and Lloyd Nelson, Road Superintendent (Respondent) (*Dismissed*)

1128-94-U: Maureen Withers (Applicant) v. Fairhaven Home for Senior Citizens (Respondent) (*Withdrawn*)

1176-94-U: International Association of Machinists and Aerospace Workers (Applicant) v. Howe Richardson Inc., a subsidiary of Staveley Inc. (Respondent) (*Withdrawn*)

1210-94-U: Len Wallace (Applicant) v. CUPE Local 543 (Respondent) v. Windsor Occupational Health Information Service (WOHIS) (Intervener) (*Withdrawn*)

1269-94-U: The Ontario Secondary School Teachers' Federation (Applicant) v. The Norfolk County Board of Education, Rick Smith, Robert Scott, Donald Drinkwater (Respondents) (*Endorsed Settlement*)

1271-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. LOEB West Grand (Respondent) (*Withdrawn*)

1283-94-U: Ronald Joseph Goodwin (Applicant) v. Canadian Union of Public Employees and its Local 3606 (Respondent) v. Foyer Richelieu Welland (Intervener) (*Withdrawn*)

1302-94-U: Yin-Nam Chow (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1072 (Respondent) (*Dismissed*)

1381-94-U; 1438-94-U; 1462-94-U; 1516-94-U: Maria Campos, on behalf of Wittles Union Employees, Market Garden and Delta Chelsea Inn Union Members (Applicant) v. Union Local 75 (Respondent); Maria Campos, Wittles Restaurant (Applicant) v. Delta Chelsea Inn Hotel (Respondent); Tony Pe, Wittles Restaurant, Chelsea Inn Hotel (Applicant) v. Delta Chelsea Inn Hotel, Local 75, Hotel and Restaurant Employees Union (Respondent); Raymond Williams, Wittles Restaurant, Chelsea Inn Hotel (Applicant) v. Delta Chelsea Inn Hotel, Local 75, Hotel and Restaurant Employees Union (Respondent) (*Withdrawn*)

1478-94-U: Laundry & Linen Drivers and Industrial Workers Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Salvation Army (Respondent) (*Withdrawn*)

1502-94-U: Rickford Herbert (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Dismissed*)

1554-94-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ultrateck Electric Inc. (Respondent) (*Endorsed Settlement*)

1563-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Best Western Continental (Respondent) (*Withdrawn*)

1564-94-U: International Brotherhood of Electrical Workers Construction Council of Ontario International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Drycore Electric Ltd. (Respondent) (*Withdrawn*)

1578-94-U: Derek Clark (Applicant) v. Canadian Union of Public Employees, Local 1744 (Respondent) v. The Toronto Hospital (Intervener) (*Withdrawn*)

1599-94-U; 1698-94-U: Teamsters Local Union No. 419 (Applicant) v. Davis Distributing Limited (Respondent) (*Withdrawn*)

1604-94-U: Labourers' International Union of North America, Local 527 (Applicant) v. Advance Cutting and Coring Ltd. (Respondent) (*Withdrawn*)

1605-94-U: Labourers' International Union of North America, Local 837 (Applicant) v. Oakdale Cleaners and Maintenance Ltd. (Respondent) (*Withdrawn*)

1607-94-U: The Ontario Public Service Employees Union (Applicant) v. The Crown In Right of Ontario Ministry of Community and Social Services (Prince Edward Heights) (Respondent) (*Withdrawn*)

1635-94-U: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Sarnia Wilding Doors Limited (Respondent) (*Withdrawn*)

1643-94-U: International Ladies' Garment Workers' Union (Applicant) v. Canadian African Newcomer Aid Centre of Toronto (C.A.N.A.C.T.) (Respondent) (*Withdrawn*)

1657-94-U: Brian O'Neil (Applicant) v. Amalgamated Transit Union International and Amalgamated Transit Union Local 946 - Cornwall (Respondents) (*Withdrawn*)

1672-94-U: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Pipe-All Plumbing & Heating Ltd. and Frank Caschera (Respondent) (*Withdrawn*)

1686-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Knight Holdings Inc., c.o.b. as Loeb Wharncliffe (Respondent) (*Withdrawn*)

1693-94-U: Ben A. Iannaci (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) (*Withdrawn*)

1707-94-U: Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 30 (Applicants) v. Sheet Metal Workers' International Association, Local 285 and Centair Systems Limited and/or #954848 Ontario Ltd., c.o.b. as Centair Systems (Respondents) (*Withdrawn*)

1711-94-U: Robert Crevier (Applicant) v. St. Joseph's Health Centre of Sarnia and London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Respondents) (*Dismissed*)

1722-94-U: Radmila Rebronja (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. The Toronto Hilton (Intervener) (*Withdrawn*)

1774-94-U: The Canadian Union of Public Employees and its Local 3722 (Applicant) v. The Corporation of the County of Prince Edward (Respondent) (*Withdrawn*)

1790-94-U: United Steelworkers of America (Applicant) v. Viking Rideau Corporation/Citicom Inc. (Respondent) (*Withdrawn*)

1797-94-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141 (Applicant) v. Greenline Resins Inc. (Respondent) (*Withdrawn*)

1830-94-U: G. Lopes (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Dismissed*)

1833-94-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Keanall Industries Inc. and/or Integrated Dynamics Inc. c.o.b. as Keanall Industries Inc. (Respondent) (*Withdrawn*)

1887-94-U: Ontario Nurses' Association (Applicant) v. The General Hospital of Port Arthur (Respondent) (*Withdrawn*)

1938-94-U: Ranjit Singh Brar (Applicant) v. The Chrysler Corp. Bramalea Assembly Plant, Canadian Auto Workers Union (Respondents) (*Dismissed*)

1942-94-U: Teamsters Union, Local 938 (Applicant) v. VytalBase T-R, A Division of Brambles Canada Inc. (Respondent) (*Withdrawn*)

1949-94-U: Labourers' International Union of North America, Local 183 (Applicant) v. Benfal Developments Inc. and Tesmar Developments Inc. (Respondent) (*Withdrawn*)

1979-94-U: Canadian Union of Public Employees - Ms. Micczyslawa Tolstolucka (Applicant) v. ABC Infant and Toddler Centre (Respondent) (*Withdrawn*)

1993-94-U: Melissa Steidman (Applicant) v. Carol Hughes (Respondent) (*Dismissed*)

2010-94-U: Judy Hebert (Applicant) v. Graphic Communication International Union (Respondent) (*Withdrawn*)

2105-94-U: Culinary & Casino Workers' Union of Ontario Local 777 (Applicant) v. Windsor Casino Ltd. (Respondent) (*Withdrawn*)

2132-94-U: Service Employees Union, Local 663 (Applicant) v. Lennox and Addington Resources for Children (Respondent) (*Withdrawn*)

2181-94-U: Patrick DeLuca (Applicant) v. City of Vaughan (Respondent) (*Dismissed*)

2211-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. James Daw and L.J. Daw Limited, c.o.b. as Brantford Home Centre (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

1321-94-M: Practical Nurses Federation of Ontario (Applicant) v. 678114 Ontario Inc. c.o.b. as Vistamere Retirement Residence (Respondent) (*Granted*)

1699-94-M: Teamsters Local Union No. 419 (Applicant) v. Davis Distributing Limited (Respondent) (*Withdrawn*)

1888-94-M: Ontario Nurses' Association (Applicant) v. The General Hospital of Port Arthur (Respondent) (*Withdrawn*)

1985-94-M: Operative Plasterers' & Cement Masons International Association of United States and Canada, Local 172, Restoration Steeplejacks; Gerald Kinsella; and John Marchildon (Applicant) v. Operative Plasterers' & Cement Masons International Association of the United States and Canada (Respondent) (*Withdrawn*)

2053-94-M: Meaford-Beaver Valley Community Support Services (Applicant) v. Ontario Public Service Employees Union, and Local 235 and Terry Moore, OPSEU Staff Representative, and Ms. Debbie Berriault and Ms. Michelle Rutt-Carlson and Ms. Mary McCauley (Respondents) (*Granted*)

2212-94-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. James Daw and L.J. Daw Limited, c.o.b. as Brantford Home Centre (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1488-94-M: Ralph Baker (Applicant) v. Local 914 Communications, Energy & Paperworkers Union (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1783-94-M: Eaton Yale Ltd., Automotive Controls Division (Applicant) v. United Steelworkers of America through its Local 4990 (Respondent) (*Granted*)

FINANCIAL STATEMENT

1838-94-M: Edward Kennedy, William MacDonald (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Sigurd Lucassen General President U.B.C. (Respondent) (*Withdrawn*)

1839-94-M: William MacDonald & Edward Kennedy (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 249 (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

2839-93-JD: Millwright District Council of Ontario on its own behalf and on behalf of its Local 1410 (Applicant) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 765; Fluor Constructors Canada Ltd. and Robert Laframboise Mechanical Ltd. (Respondents) (*Granted*)

4514-93-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 and International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Labourers' International Union of North America, Local 506, Ellis-Don Ltd., Groff and Associates Ltd. and The State Group Ltd., (Respondents) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Intervenors) (*Granted*)

0316-94-JD: Ontario Secondary School Teachers' Federation (Applicant) v. Kent County Board of Education and The Canadian Union of Public Employees, Local Union No. 2214 (Respondents) (*Withdrawn*)

1616-94-JD: Ontario Nurses' Association (Applicant) v. Lambton County Health Unit and Canadian Union of Public Employees Local 1291 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2922-93-M: Surrey Place Centre (Applicant) v. Ontario Public Service Employees' Union, Local 511 (Respondent) (*Dismissed*)

4320-93-M: Ontario Public Service Employees Union, Local 241 (Applicant) v. Mohawk College of Applied Arts and Technology (Respondent) (*Endorsed Settlement*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2467-93-OH: Rob Robbins, Health and Safety Representative, Local 1986, United Plant Guard Workers of America, and all members of Local 1986 (Applicant) v. General Motors of Canada Limited (Respondent) (*Withdrawn*)

0325-94-OH: Arnott Small (Applicant) v. CAMI Automotive Inc. (Respondent) v. CAMI Automotive Inc. on behalf of Brian MacDonald and John Henry (Intervener) (*Withdrawn*)

0872-94-OH: Linda Weir (Applicant) v. The Durham Board of Education (Respondent) (*Withdrawn*)

1368-94-OH: Martin DiPaolo (Applicant) v. Steno Electric Ltd. (Respondent) (*Dismissed*)

1948-94-OH: Patrick J. McCarthy (Applicant) v. Mendelson Films Ltd. (Respondent) (Terminated)

1986-94-OH: Ian Speakman (Applicant) v. Studio Signs (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1797-93-G: Labourers' International Union of North America, Local 491 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)

2624-93-G: Quality Control Council of Canada (Applicant) v. N.D.E. Service Group Inc. (Respondent) (*Endorsed Settlement*)

2694-93-G: Quality Control Council of Canada (Applicant) v. BLM Inspection Service Inc. (Respondent) (*Endorsed Settlement*)

2743-93-G: Quality Control Council of Canada (Applicant) v. Crawford McLeish NDE Inc. (Respondent) (*Endorsed Settlement*)

2761-93-G: International Union of Elevator Constructors Local 90 (Applicant) v. Dover Corporation (Canada) Ltd. (Respondent) (*Dismissed*)

3053-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Andrew Paving & Engineering Limited (Respondent) (*Granted*)

3570-93-G: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. J.S. Electric (1989) Ltd., J.S. Industrial Sales & Service Ltd., J.S. Industrial Sales & Service (1993) Inc. and Industrial Electrical Contractors Limited (Respondent) (*Endorsed Settlement*)

3736-93-G: The Ontario Allied Construction Trades Council and Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Hydro and the Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

4003-93-G: International Brotherhood of Painters and Allied Trades, Local 200 (Applicant) v. 882709 Ontario Inc. c.o.b. as Killarney Glass (1992) (Respondent) (*Withdrawn*)

4316-93-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Miro Elevators Limited (Respondent) (*Endorsed Settlement*)

4480-93-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. Gage Metal Cladding (Respondent) (*Endorsed Settlement*)

0148-94-G; 0516-94-G: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Fluor Con-

structors Canada Ltd. (Respondent); Sheet Metal Workers' International Association, Local 269 (Applicant) v. Robert Laframboise Mechanical Ltd. (Respondent) (*Withdrawn*)

0154-94-G: Ontario Pipe Trades Council (Applicant) v. Riveroak Construction Ltd. and Di Marco Plumbing & Heating Company Limited (Respondents) (*Endorsed Settlement*)

0221-94-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Dixie Elevator Ltd. (Respondent) (*Endorsed Settlement*)

0318-94-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Corporation of the City of Toronto (Respondent) v. A Council of Trade Unions Acting as the Representative and Agent of Teamsters' Local 230 and Labourers' International Union of North America, Local 183 and Labourers' International Union of North America, Local 183 on its own behalf, Metropolitan Toronto Sewer and Watermain Contractors Association, S. McNally and Sons Limited (Intervenors) (*Endorsed Settlement*)

0386-94-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. B & T Airway Engineering Inc. (Respondent) (*Granted*)

0426-94-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. M.E.M. Contracting and Jomar Drywall Inc. (Respondent) (*Granted*)

0429-94-G: International Union of Operating Engineers and its Local 793 (Applicant) v. Robert Hume Construction Ltd. (Respondent) (*Dismissed*)

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November 1994



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

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EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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BEFORE: *Gail Misra*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

APPEARANCES: *John Moszynski*, *Tony Neil*, *Robert Leone* and *Robert Maskey* for the applicant; *Michael Horan*, *Ian Steer* and *Roger Marsland* for the responding party; *J. James Nyman*, *Frank O'Reilly* and *Bud Calligan* for the intervenor.

DECISION OF THE BOARD; November 18, 1994

1. This is a referral to the Board, under section 126 of the *Labour Relations Act*, of a grievance in the construction industry. At the hearing, upon the applicant's request, and with the leave of the Board, E & D Services was deleted from the style of cause as a responding party. That left UMACS of Canada Inc. as a responding party.
2. The applicant and responding party UMACS agreed that the name of this responding party had been formally changed to: Aluma Systems Canada Inc. However, since all of the documentation filed referred to UMACS of Canada Inc., for the purposes of this decision, we will refer to this responding party as "UMACS" or "Aluma Systems Canada Inc."
3. Aluma Systems Canada Inc. is the largest known supplier of rental scaffolding equipment in Canada. It has regional and local offices across the country from which rental and sales of forming, shoring, and access scaffold equipment occurs. With the rental of access scaffolding Aluma also offers services for the erection and dismantling of the scaffold, a service for which the customer pays. Of Aluma's total revenues of approximately \$15 million, three million dollars worth is for the labour provided. Aluma spends approximately 82% of that three million dollars to pay for the labour it provides for erection and dismantling of scaffolding.
4. The applicant trade union grieves that the responding party, as a member of the Sarnia Construction Association, is bound by the ICI Collective Agreement between the Employer and Employee Bargaining Agencies. The trade union is therefore seeking a declaration that UMACS of Canada is bound by that collective agreement.
5. The collective agreement in question is the provincial collective agreement between the Labour Relations Bureau of the Ontario General Contractors Association; the Ontario Masonry Contractors Association; the Industrial Contractors Association of Canada; the Waterproofing Contractors Association of Ontario; the Concrete Floor Contractors Association of Ontario (also referred to as the "EBA" or "Employer Bargaining Agency"); and the Labourers International Union of North America and the Labourers' International Union of North America, Ontario Pro-

vincial District Council, on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081, and 1089 (also referred to as the "union"). The term of the collective agreement is May 1, 1992 to April 30, 1995.

6. The responding party denies it is bound by any provincial collective agreement with the applicant, and in the alternative, takes the position that the applicant has abandoned its bargaining rights outside of the Sarnia area. Prior to the end of the hearing UMACS withdrew its argument that the applicant had abandoned its bargaining rights outside the Sarnia area. The responding party also posits that the applicant is estopped from claiming any bargaining rights with respect to the UMACS scaffolding business outside of the Sarnia area.

APPLICATION TO INTERVENE

7. On the first day of hearing, the Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and the United Brotherhood of Carpenters and Joiners of America, Local 18 (also referred to as the "Carpenters") appeared, having applied to be intervenors in this case. The applicant objected to their participation on the grounds that the grievance it had filed was only seeking a declaration that the responding party was bound by the provincial ICI agreement, a matter in which the Carpenters had no interest. The applicant's counsel undertook to inform the intervenor if at any time the applicant decided to arbitrate work assignment grievances which have already been filed against UMACS or should any other work assignment issues regarding scaffolding arise, related to this responding party, in which the Carpenters may have an interest.

8. After considering the submissions of all of the parties, the Board ruled orally that since the union's section 126 application was only seeking a declaration with respect to bargaining rights vis a vis this employer, the Board was of the view that the Carpenters did not have an interest which required their participation in this hearing. The Board noted for the record applicant's counsel's undertaking, as outlined above.

THE FACTS

9. The facts of this case were largely undisputed and are outlined below.

10. Andrew Pilat, the General Manager of the Sarnia Construction Association (also referred to as the "SCA"), gave evidence that the SCA is a constituent member of the Labour Relations Bureau of the Ontario General Contractors Association, which itself is a constituent of the Employer Bargaining Agency which negotiates with the union in this case.

11. The Sarnia Construction Association has been negotiating on behalf of its members with the union since the early 1950's, long before the 1978 advent of provincial bargaining. Prior to 1978 the SCA had a collective agreement with the applicant for work which is now recognized to be work in the ICI sector.

12. There are two categories of membership in the SCA, Associate Membership and Membership. According to the Constitution of the Association, these categories are differentiated as follows:

BY-LAW NUMBER 1

• • •

MEMBERS

1. The subscribers to the Memorandum of Agreement of the Corporation shall be the first members and it shall rest with the directors to determine the terms and conditions on which subsequent members shall from time to time be admitted.

a. There shall be two categories of membership within the SARNIA CONSTRUCTION ASSOCIATION known [sic] as "MEMBERS" and "ASSOCIATE MEMBERS".

A "MEMBER" organization shall be bound by all the terms and conditions of all labour agreements entered into and signed in the name and title of the SARNIA CONSTRUCTION ASSOCIATION.

An "ASSOCIATE MEMBER" organization shall have completely equal status in all the business, functions and aims of the SARNIA CONSTRUCTION ASSOCIATION, except that "ASSOCIATE MEMBERS" will be excluded from being bound by any labour agreement entered into and signed by the SARNIA CONSTRUCTION ASSOCIATION.

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c. The Directors shall decide into which category of membership an applicant organization shall be enrolled.

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According to Mr. Pilat, if an associate member organization does field work, the Board of Directors can determine member status for that organization. An associate member organization known to be doing work in the Sarnia area, work for which the SCA has collective agreements, would be invited to change its status from associate status to full member status, or could withdraw from the Sarnia Construction Association.

13. In 1989 Anthes Equipment Ltd. (also referred to as "Anthes") was bought by UMACS of Canada Inc. Anthes Equipment had been an associate member of the Sarnia Construction Association since 1981. On June 1, 1983, the Branch Manager for Anthes wrote the following letter to the SCA:

"Anthes Equipment Ltd. would *like to become full members* of the Sarnia Construction Association, rather than our present status as Associate Member.

In the, not too distant future, we will have need to employ unionized trades people for various projects.

We hope this meets with your approval and await your reply at your earliest convenience."

[emphasis added]

14. By the following letter dated June 14, 1983, full membership in the SCA was approved:

"This will advise that the Directors of the Sarnia Construction Association have approved your request of June 1, 1983 to change the membership of Anthes Equipment from "Associate Member" to a "*Member*" with *full status* in the Sarnia Construction Association.

You are reminded of the requirements of the Bylaws of the Association, and the extract of the Bylaws printed on the application form enclosed herein for your information. As a Member of

the Association you are party to, and bound by, the terms and conditions of all collective agreements negotiated *through the Association* on behalf of all members.”

[emphasis added]

15. Thereafter, Anthes renewed its full member status in the Sarnia Construction Association annually until 1989. By a letter dated April 20, 1989, the SCA was informed that Anthes had been purchased by UMACS. In November 1989 UMACS of Canada Inc. renewed Anthes’ membership in its own name and indicated it would be sending one representative to the Association. The membership form contains the following paragraph under which the UMACS representative affixed his signature:

I do hereby state my willingness to cooperate with, and be governed by the laws and rules of the SARNIA CONSTRUCTION ASSOCIATION, and agree not to participate in any unfair business practices, and also unite with the section of each trade in which I am an employer and cooperate with said group.

SIGNED BY _____ (name illegible)
(cheque to be attached - payable to S.C.A.)

16. On June 22, 1990, Robert Leone, Business Manager for the Labourers’ Local 1089, wrote to UMACS to inform the employer of changes to the collective agreement and the new wage schedule for the Labourers. Included in that letter was detailed information regarding the “LABOURERS’ ICI WAGE SCHEDULE”.

17. By a letter dated October 11, 1990, Mr. Pilat, in his position as General Manager of the SCA, wrote to UMACS of Canada Inc. and informed them that “under *the terms of the Provincial ICI and Local Maintenance Collective Agreements* with the Labourers’ International Union of North America, Local 1089” (emphasis added), they were required to make contributions to the group RRSP which had been established for union members.

18. UMACS renewed its full membership in the Sarnia Construction Association for 1991, 1992, 1993, and 1994. In each year the membership renewal form contained the paragraph outlined in paragraph 14, above, and was signed by a representative for UMACS. The company’s name appeared every year in the “Membership List and Trade Directory” for the Sarnia Construction Association as a member of the Association.

19. The establishment of a Labour Relations Council of the SCA is authorized by section 21 of the Association’s By-Law Number 1:

21. LABOUR RELATIONS COUNCIL

There shall be established as part of the Corporation, a Labour Relations Council. The objects of the Labour Relations Council shall be -

(a) Firstly; to regulate all negotiations, and to direct all negotiations, in a manner that the Council may from time to time decide. Each employer, party to any collective agreement, is bound by the decisions of the Labour Relations Council.

(b) Secondly, to regulate all labour relations matters during the term of each agreement.

(c) The Council shall comprise of representatives in the same number as each category specified for representation to the board of directors, except that the Associate Membership category may not be represented. The original establishment of the Council shall be by the Directors, who shall appoint to the Council, in consultation with representatives of each category the chairman of each management bargaining committee, plus others as required.

20. The Sarnia Construction Association, pursuant to its authority in By-Law Number 1, authorizes a Labour Relations Council to act as follows:

3.1 (a) The Labour Relations Council of the Sarnia Construction Association, *or any group to whom they delegate authority*, shall have the right to deal with all matters having to do with any area of Labour Relations, related to any of the members of the Sarnia Construction Association, and any and all groups, companies, firms, corporations, syndicates, or associations who would be covered by any certificate of Accreditation given the Sarnia Construction Association, or the organization they have named. However this does not deny the right of any member organization to belong to a regional or provincial accredited group.

(b) The Corporation shall seek, in its own name, *or in the name of any body or group to whom they delegated proper authority*, certificates of accreditation for any Area and Sector covering any trade union, council of trade unions, or combination of trade unions, as it may from time to time decide.

[emphasis added]

21. As mentioned earlier, the Sarnia Construction Association is a member of the Labour Relations Bureau of the Ontario General Contractors' Association. As such, it is governed by the by-laws of the Bureau. According to Jim Thomson, the General Manager of the Labour Relations Bureau, the Bureau was set up after the advent of province-wide bargaining to represent the general contractors and some trade contractors who had been negotiating collective agreements at the local level prior to provincial bargaining. There are presently fourteen geographic areas which have membership in the Bureau. The Bureau is one of the constituents in the designated Employer Bargaining Agency. Article 1 of By-Law Number 1 of the Labour Relations Bureau defines what the Bureau is responsible for:

1. The Bureau shall be responsible for the regulation of all labour matters, which are defined as matters involving the representation of employers under the Labour Relations Act, involving local employer organization members of the Bureau and employers for whom the Bureau has a right to represent in labour matters. The Bureau shall *in its own name be an employers' bargaining agency for employers in any geographical area or areas, or part thereof which includes all or part of the Province of Ontario for the industrial, commercial and institutional sector of the construction industry with any trade union, council of trade unions or combinations of trade unions and each member of the Bureau who is affected shall be deemed to have authorized the Bureau to act on its or his behalf.*

[emphasis added]

Local employer organization members of the Bureau have representation on the Steering Committee of the Bureau and on bargaining committees for each set of negotiations (Article 6). Sarnia, pursuant to Article 6, is named as having one vote. Members of the Steering Committee must ratify, by a simple majority, any settlement reached by a negotiating committee. The General Manager of the Bureau and any duly authorized persons execute labour agreements reached by the Bureau. Agreements signed in the name of the Bureau are deemed to be binding on the Bureau and upon all members of the Bureau for whom it was authorized to negotiate (Article 7).

22. According to Mr. Pilat, he has participated, along with others from the Sarnia Construction Association, in every round of negotiations since 1980 for the Master Portion of the provincial ICI agreement with the Labourers. He has done so as a representative of a constituent member of the Labour Relations Bureau. The SCA representatives who will participate in the bargaining are chosen at the local level at a Sarnia Construction Association Labour Relations Council meeting. The SCA representatives hold regular meetings during negotiations to inform their own

members of what is happening in the negotiations. UMACS, as a member of the SCA, can send one delegate or an alternate to the Labour Relations Council meetings.

23. In addition to participating in negotiations for the Master Portion of the ICI agreement, the Sarnia Construction Association negotiates its own local schedule with Local 1089 (also referred to as the "Local 1089 Schedule"). These negotiations are conducted subject to the ratification provisions of the constitution of the Labour Relations Bureau of the Ontario General Contractors Association, the Employer Bargaining Agent for the SCA.

24. Mr. Pilat indicated it was not uncommon for a contractor in the Sarnia area to be bound by collective agreements for both the Carpenters and the Labourers in respect of scaffolding work. It was not disputed that where both carpenters and labourers work together on scaffolding work, they tend to work in a ratio of two carpenters for every labourer.

25. The Sarnia Construction Association, after the advent of provincial bargaining and the Employer Bargaining Agent (also referred to as the "EBA") designations, does not sign the Master Portion of the ICI collective agreement in its own name and title. Rather, as a member of an Employer Bargaining Agent, the Labour Relations Bureau, it is deemed bound by that EBA. The SCA does sign a local Construction Maintenance Work agreement with Local 1089 in its own name and title. Mr. Pilat explained that when contractors join the Sarnia Construction Association as full members the Association explains to them that they are assigning their bargaining rights to the Association. They are told they will be picking up the provincial ICI agreement and are told what trades are affected by the agreements which the SCA is a party to. That is also apparently the purpose of the explanation in the letter sent to Anthes when it joined the Association as a full member (referred to above in paragraph 14).

26. The local Construction Maintenance Work agreement entered into by the SCA is authorized by the Master Portion in Article 7.03 as follows:

7.03 IN-PLANT REPAIR AND RECONSTRUCTION

For in-plant construction work defined as repair and reconstruction, it is understood that the Local Union and the Local Employers Group or Trade Association may adopt special conditions by mutual agreement in writing regarding hours of work, overtime, travel allowance and other working conditions on a project basis to better enable them to provide service to specific industrial in-plant sites where it is mutually advantageous. Any such Agreement will be in writing between the Local Union having jurisdiction in the area of the project or projects and the Local Construction Association or trade association which is a party to the trade appendices of this Collective Agreement.

27. The Sarnia Construction Association and Labourers' Local 1089 reached the local agreement to cover in-plant repair and reconstruction work in all local industrial plants covered by the Master Portion of the ICI agreement. This local agreement does not apply to new construction, but only to maintenance-oriented repair and reconstruction work and is negotiated locally as part of the ICI agreement, under the aegis of the EBA.

28. Bob Leone, the Business Manager of Local 1089, indicated that UMACS has continued to employ members of his local in the Sarnia area since the middle of 1989, when UMACS took over from Anthes. Those labourers were employed tending carpenters in the erection and dismantling of scaffolding. To Mr. Leone's knowledge, UMACS has paid wages to those employees, and has made contributions to the union on behalf of the labourers, in accordance with the ICI agreement and the Local 1089 schedule. The union only supplies labourers to those companies with

which it has collective agreements. Such employers may be part of the Sarnia Construction Association or not, but are all bound by the ICI agreement.

29. Tony Neil, an Assistant Business Manager for the District Council of the Labourers, has responsibilities for the ICI sector and for demolition. When he took over his present job in September 1993, he began updating the union's files on its bargaining rights and checked whether the collective agreements the union had with employers were being complied with. When he checked on UMACS, it became apparent that UMACS had only made remittances and pension contributions in the Local 625, Windsor area, and in the Local 1089, Sarnia area. After checking with Mr. Leone, the Business Manager for the Sarnia local, he found that the basis for the bargaining rights in the Sarnia local were through UMACS' full membership in the Sarnia Construction Association. The obligations which flow from full membership in the SCA have been outlined above.

30. Mr. Neil reported his finding, that UMACS was bound to the provincial ICI agreement, at a District Council Delegate meeting and informed the Business Managers across the province that the union had bargaining rights with respect to UMACS and that they should assert those bargaining rights. On February 28, 1994, Mr. Neil filed the first grievance asserting bargaining rights on behalf of a Local other than the Windsor or Sarnia locals. It was uncontroverted that UMACS had not recently utilized Labourers' members anywhere except in the Windsor and Sarnia areas.

31. The evidence of contributions made in the Windsor area was limited to two instances of contributions being made on two occasions in 1991, for unspecified work.

32. According to Ian Steer, the Ontario Regional Manager for Aluma Systems Canada Inc., people are hired for the erection and dismantling of scaffolding on an "as needed" basis through the hiring halls. Medium-sized locations have a working supervisor on staff at all times and that individual would supplement his workforce as necessary. Aluma Systems has had a province-wide collective agreement with the Carpenters since around 1986. In the Toronto and Hamilton areas the employer has only used carpenters and their apprentices, and has not utilized any labourers. To Mr. Steer's knowledge, the London area office also uses carpenters and carpenters' apprentices, except for the two occasions in Windsor of which he was made aware at the hearing.

33. Mr. Steer indicated that the Sarnia area had always been treated differently as both carpenters and labourers were hired there to do the erection and dismantling work. According to him, most of the work in the Sarnia area is inside chemical plants. The practice was to hire labourers to fetch, carry, lift, and hand pieces to the carpenters who actually erect the scaffold. He confirmed that the ratio of hiring was one labourer for every two carpenters hired, and did not dispute that when working for UMACS, labourers were likely paid in accordance with the Local 1089 Schedule in the ICI agreement. Mr. Steer indicated that the Carpenters had bargaining rights through the certification process, but to his knowledge there was no certificate or voluntary recognition agreement with respect to the Labourers.

34. According to Mr. Steer, the Sarnia office is a small office and is therefore a training ground for new managers who tend to come there for short periods of tenure. He accepted that his managers had called both the Sarnia Construction Association and the union to find out what the practice was with respect to hiring for the erection and dismantling of scaffolding. While Mr. Steer maintained his managers only followed the local *practice*, he was not aware of any manager in Sarnia indicating to anyone that UMACS was not bound by the collective agreement with the Labourers.

35. Mr. Leone indicated he had been called by Mr. Jack MacDowell, a Sarnia UMACS

employee, on a number of occasions for clarification of clauses of the collective agreement. Mr. Steer suggested in his evidence that Mr. MacDowell was not a person with authority in the Sarnia office as he was the working foreperson and estimator for jobs. However, it is clear that Mr. MacDowell was the UMACS alternate voting member to the Sarnia Construction Association. Mr. MacDowell was not called as a witness.

36. According to Mr. Steer, his managers did have the authority to bind the corporation in labour relations matters and to deal with the Sarnia Construction Association, and they did renew their full membership in the Association every year after UMACS bought Anthes.

37. UMACS called Brian Forester, the Erection and Dismantling Supervisor for the Toronto and Hamilton areas, as a witness. He is responsible for the hiring and termination of all of the staff in the erection and dismantling area, manages the job sites, and does some estimating. Mr. Forester had worked for Anthes in the Toronto and Hamilton areas from 1986 to 1989 as a scaffolder and then as a scaffold foreman. He recalled that in 1986 and 1987 Anthes was using labourers on its job sites but then stopped doing so. Although Mr. Forester gave some evidence of having worked “up north” while employed at Anthes, he gave no indication of where this work was or how far up north he was referring to. He also referred to some hearsay in testifying to the use of labourers “up north”. We decline to accept his evidence on work outside of the Toronto and Hamilton areas as it lacked specificity and was of a hearsay nature.

THE ARGUMENTS

38. The union argued that Aluma Systems Canada Inc., and its predecessors UMACS and Anthes, were all bound by the by-laws of the Sarnia Construction Association by virtue of their full membership in that Association. The union relied on the decision in *Great Lakes Fabricating*, [1982] OLRB Rep. June 872, wherein the Board found that full membership of Great Lakes Fabricating in the Sarnia Construction Association meant that employer was bound by the by-laws of the SCA and therefore the employer was bound to the collective agreements reached by the SCA. The Board found this was the case even though Great Lakes Fabricating did not itself have a certificate with the union in question and did not itself have a collective agreement with that union.

39. The distinguishing feature of the *Great Lakes Fabricating* case, however, is that the Board there specifically found that the employer had been a full member of the SCA since 1961, and that the Sarnia Construction Association had bargained on behalf of its members with the civil trades prior to the advent of province-wide bargaining in the construction industry in 1978.

40. In pointing to the similarities between the *Great Lakes* case and the one before us, the union indicated that UMACS has been a full member of the Sarnia Construction Association, it has permitted the SCA to bargain on its behalf, and, in Sarnia and Windsor it has observed the collective agreement which binds the SCA and its members to the Labourers' Union. In accordance with sections 52(1) and 52(2) of the *Labour Relations Act*, the union argues the Sarnia Construction Association bargained with the Labourers, it gave the union a list of the names of the employers on whose behalf it was bargaining (including UMACS), and UMACS never indicated to the union it was NOT bound by the collective agreement reached between the employers' organization and this trade union. In any event, the union argued that the SCA also signed the local Construction Maintenance Work agreement in its own name and title and UMACS has accepted and adhered to that agreement.

41. Although the union referred the Board to section 52 of the Act, this section does not apply to a designated or accredited employer bargaining agency nor to a designated or certified employee bargaining agency. However, section 149 of the Act does apply, and it states as follows:

149.-(1) Section 52 does not apply to a designated or accredited employer bargaining agency or a designated or certified employee bargaining agency.

(2) A provincial agreement is, subject to and for the purposes of this Act, binding upon the employer bargaining agency, the employers represented by the employer bargaining agency, the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency, the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119, and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.

(3) Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purposes of section 126.

42. The union also relies on section 139(2) of the *Labour Relations Act* for the proposition that when the Sarnia Construction Association bargains with the trade union, it does so pursuant to the constitution of the Labour Relations Bureau, a designated employer bargaining agent. Since UMACS is represented in provincial bargaining by a designated employer bargaining agent, it is bound to the product of that bargaining, the provincial ICI collective agreement (sections 145 and 149(2) and (3) of the Act). Pursuant to section 148 of the Act, there can be only one provincial agreement for each provincial unit which is represented by an employer and employee bargaining agency.

43. For ease of reference, the sections of the Act relied on by the union are outlined below:

139.-(1) In this section and in sections 137 and 140 to 155,

"affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency; ("agent négociateur affilié")

"bargaining", except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119; ("négociation")

"employee bargaining agency" means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union; ("organisme négociateur syndical")

"employer bargaining agency" means an employers' organization or group of employers' organizations formed for purposes that include the representation of employers in bargaining; ("organisme négociateur patronal")

"provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119. ("convention Provinciale")

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry, referred to in the definition of "sector" in section 119, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

* * *

145. Where an employer bargaining agency has been designated under section 141 or accredited under section 143 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement; and
- (b) an accreditation heretofore made under section 129 of an employers' organization as bargaining agent of the employers in the industrial, commercial and institutional sector of the construction industry, referred to in the definition of "sector" in section 119, represented or to be represented by the employer bargaining agency is null and void from the time of such designation under section 141 or accreditation under section 143.

44. The union argues that the scheme of the Act does not permit an employer to be bound by the provisions of a provincial ICI agreement in only one part of the province and that the action of UMACS is therefore prohibited. Counsel drew the Board's attention to the correspondence between Anthes and then UMACS, and the SCA, which reminded the employer of the SCA by-laws and that the employer was bound by all the collective agreements reached by the Association on behalf of its members.

45. In arguing for its position, the union relied on the Board's decision in *C.H. Heist Ltd.*, [1992] OLRB Rep. June 677, which it argued was similar to the case before this panel. In that case, the Carpenters' Union asserted that the employer was bound to the Carpenters' provincial collective agreement by virtue of the employer's full membership in the Sarnia Construction Association. The employer denied that the union held bargaining rights or that the employer was bound by any collective agreement with the union. Membership in the SCA was defined then exactly as it is in the case before this panel of the Board. C.H. Heist Ltd. had been a member of the SCA prior to the SCA entering into a collective agreement with the carpenters in 1975. Heist had therefore also been a member of the Sarnia Construction Association prior to the advent of the province-wide collective bargaining scheme for the ICI sector in 1978. The Board accepted that the employer was a member of the SCA, it had been listed for many years in the SCA Trade Directory, and the employer had never denied that it was bound by the Carpenters' provincial collective agreement until the instance which was the subject of the grievance before the Board. The Board therefore decided that the employer was bound by the provincial ICI agreement reached by the employer bargaining agency and the Carpenters' Union.

46. The union's alternative argument was that if UMACS is arguing it is only bound by agreements made in the name and title of the Sarnia Construction Association, then the local Construction Maintenance Work agreement is such an agreement. However, the union argues, the local Construction Maintenance Work agreement has a "pick-up" clause in Article 4 which acts to bind the employer to the ICI agreement for all new construction in the Sarnia area. Since an employer cannot be bound to an ICI agreement in only one part of the province, the union argues

that the employer is bound to the ICI agreement generally. The relevant portions of Article 4 are outlined below:

- 4.01 Maintenance work is work performed by replacing or renovating (commonly known as repair work) of existing facility within a plant so as to keep it in efficient operating condition (but excluding adding of new equipment) which is covered by Article 4.02.
- 4.02 The scope of this agreement shall not apply to work performed by the employer of a new construction nature which is work required to erect new facilities in which event the work shall be performed in accordance with the provisions of the prevailing construction agreement.
- 4.04 Where the term "prevailing construction agreements" is used herein, it shall mean those provincial construction agreements entered into between the respective Employer Bargaining Agency, and Councils of Union, as they apply to Lambton County.

47. The responding party argued that there were no bargaining rights held by the applicant in this case, and in the event that the Board finds that there are such rights, all of the locals other than the Sarnia local are estopped from advancing those rights.

48. The main argument made on behalf of the employer is that neither it, nor its predecessor, Anthes, were members of the Sarnia Construction Association at or prior to the introduction of province-wide bargaining, and that therefore any arrangements concluded by the Sarnia Construction Association since 1978 cannot be in the ICI sector as such arrangements are not in the name or title of the Sarnia Construction Association, which, the responding party argues, is all the SCA by-law permits. Despite the repeated renewals of membership in the Sarnia Construction Association, UMACS argues that its obligations cannot go any further than what the Sarnia Construction Association can legally do, and the SCA cannot sign an ICI agreement in its own right because it is not a designated employer bargaining agent.

49. The employer argues that the local Construction Maintenance Work agreement reached in the name and title of the SCA does not dovetail with the ICI agreement because it was not the type of agreement envisaged by Article 7.03, it is not a site-specific, project-specific agreement for in-plant repair and reconstruction work. To the extent that it purports to be an ICI-related collective agreement, the employer argues it must be null and void as there can be only one provincial ICI agreement, the Master Agreement.

50. UMACS posits that it gave the SCA limited bargaining authority when it became a full member of the Association as it could only give it authority to bargain for collective agreements for non-ICI work. Since the SCA was not a designated employer bargaining agent after 1978, it could not bargain for an ICI agreement. The UMACS position is therefore that the SCA could not confer its bargaining authority for post-1978 full members to an EBA, since it did not have that authority any longer. *Great Lakes Fabricating*, cited above, and *C.H. Heist Ltd.*, cited above, are therefore seen as of little assistance to the Board in deciding this matter.

51. The employer relied on two excerpts from legal texts for the proposition that while the Sarnia Construction Association may be seen as the agent for UMACS, the Employer Bargaining Agency has no strict agency relationship with UMACS and therefore cannot bind the employer to the provincial ICI agreement. The union countered this argument by suggesting that the Sarnia Construction Association was very clear with its new members and renewing members that they were delegating their collective bargaining authority to the SCA and that the members were going to be bound by the collective agreements. Each member was given a delegate and alternate position so that they could participate in the negotiation process, and UMACS was no exception.

52. The other argument made by UMACS is that it has simply observed the terms of the ICI agreement in the Sarnia area, but it has had no legal obligation to do so.

53. On the issue of estoppel, UMACS argues that the union has not asserted its rights anywhere except in Sarnia for twelve years. The employer suggests that the evidence with respect to Windsor is of no assistance to the Board. UMACS, during that period, has adhered to a provincial agreement with the Carpenters' Union and has utilized carpenters for all of the scaffolding erection and dismantling work outside of the Sarnia area. It therefore envisages 25 jurisdictional disputes if the Board should find that the employer is bound to the provincial ICI agreement. Since neither party has felt bound by or guided by the provincial ICI agreement for twelve years, the employer argues the Board should not now change the *status quo*.

54. The further prejudice argued by the employer is that if the employer had been put on notice by the trade union earlier with respect to the broad bargaining rights it claimed, UMACS could have resigned from the Sarnia Construction Association and avoided such an obligation.

55. According to the responding party, an estoppel should run for an indefinite period, and at a minimum, beyond the time of the negotiation of the next collective agreement. This would be an attempt to put the employer back in the position it would have been in but for the union's non-assertion of its rights until this late stage when this employer has an established practice of giving its work to carpenters and their apprentices.

56. The union counters the employer's request for an endless estoppel, arguing that the employer cannot show any detrimental reliance resulting from the limited declaration the union is seeking in this proceeding. In any event, the union posits that the employer cannot claim it needs an endless, or twelve-year estoppel, since Anthes is known to have used labourers at least until 1987, on Mr. Forester's evidence. In addition, the estoppel should not be supported everywhere except in Sarnia as there is evidence of UMACS employing labourers in the Windsor area. The union queries whether there can be *any* detrimental reliance in this case since neither the union nor the employer was aware of the broad bargaining rights held by the union. The union did not knowingly fail to assert its strict legal rights, and the employer could not therefore argue any detriment, except to accept that it had the commercial advantage of avoiding an obligation for the period in question.

DECISION

57. We have carefully considered all of the evidence and the submissions of the parties in arriving at our decision. The evidence indicates that Anthes became a full member of the Sarnia Construction Association in the full knowledge that it would then become bound to collective agreements. In its letter requesting full membership, it indicated it would be needing "to employ unionized trades people for various projects". When the SCA accepted Anthes as a full member, it reminded Anthes, in writing, of the requirements of its by-laws and indicated to Anthes that as a member Anthes was "party to, and bound by, the terms and conditions of *all collective agreements negotiated through the Association on behalf of all members*" (emphasis added). Thus the SCA put Anthes on notice that pursuant to the SCA by-laws it would be a party to and bound by *all* the collective agreements entered into *through* the Sarnia Construction Association. From the evidence before us, it appears that Anthes did apply the Labourers' ICI agreement both in Sarnia and in areas outside of Sarnia at least until 1987.

58. The responding party did not dispute that in 1989 UMACS stepped into the shoes of Anthes. UMACS thereafter maintained full member status in the Sarnia Construction Association and representatives of UMACS annually renewed the company's membership. The annual mem-

bership renewal form required member organizations to indicate that they stated their willingness to be governed by the “laws and rules of the SARNIA CONSTRUCTION ASSOCIATION”, and UMACS representatives complied by signing the form and paying the full membership fee.

59. The responding party admitted it had applied the Construction Maintenance Work agreement between the SCA and Local 1089 in the Sarnia area, had complied with the area practice of employing one labourer for every two carpenters hired, and the uncontroverted evidence was that its representatives had called the SCA and Local 1089 representatives for clarification of the collective agreements over the years. We find on the evidence that by virtue of its membership in the Sarnia Construction Association, UMACS was bound by the Construction Maintenance Work agreement between the SCA and Labourers’ Local 1089.

60. The Sarnia Construction Association, by virtue of Article 3.1(a) of its by-laws, contemplates that the Labour Relations Council of the SCA, has the power to delegate its authority to deal with all matters having to do with any area of labour relations to “any group”. Article 3.1(b) of the by-laws allows the corporation of the SCA to, in its own name or “in the name of any body or group to whom [it] delegated proper authority”, to seek certificates of accreditation for any area or sector covering any trade union.

61. There was no dispute about the SCA’s membership in the Labour Relations Bureau of the Ontario General Contractors’ Association, the designated Employer Bargaining Agency for province-wide bargaining. The by-laws of the Labour Relations Bureau indicate clearly in Article 1 that “each member of the Bureau who is affected shall be deemed to have authorized the Bureau to act on its or his behalf”. Article 6 of the Bureau by-law names Sarnia as having one vote on the Bureau Steering Committee. Pursuant to Article 7 of the Bureau by-laws, agreements signed in the name of the Bureau are deemed to be binding on the Bureau and upon all members of the Bureau for whom it was authorized to negotiate.

62. It is the Labour Relations Bureau of the Ontario General Contractors’ Association, with the participation of the Sarnia Construction Association, and others, which negotiates the provincial ICI agreement in question here. After the advent of province-wide bargaining the SCA could no longer enter into an ICI agreement in its own name and title because it was not a designated EBA. However, it could, and did, join with other local construction associations and, through the Labour Relations Bureau of the designated EBA, have a voice in province-wide bargaining. The post-1978 bargaining scheme did not allow individual employers to bargain separately for a province-wide collective agreement (a “provincial agreement”, cf. section 139(1)), so that a company like UMACS could not on its own bargain for such an agreement. It can, however, have meaningful input into the bargaining of the provincial agreement, by becoming a member of the entity that does bargain the provincial agreement for employers across the province. UMACS did so in the customary way, by joining a local employer or contractor organization, which in turn is a member of the EBA. Membership in the Sarnia Construction Association entails being tied to the collective agreements entered into by the SCA. At the next level, since the SCA is a constituent member of the Labour Relations Bureau, all members of the SCA are bound by the provincial collective agreements entered into by the Labour Relations Bureau.

63. Mr. Thomson, the General Manager of the Labour Relations Bureau, indicated that the Construction Maintenance Work agreement entered into by the SCA, is a part of the ICI agreement and is entered into under the aegis of the Employer Bargaining Agency. Such an agreement is contemplated by Article 7.03 of the Master Portion of the ICI agreement with the Labourers.

64. As indicated earlier, the responding party was bound to the local Construction Maintenance Work agreement through its membership in the Sarnia Construction Association. Similarly,

through the SCA's membership in the Labour Relations Bureau, the responding party is bound to the provincial ICI agreement with the Labourers' International Union of North America.

65. We do not accept the responding party's argument that since it, and its predecessor Anthes, became a member of the SCA after the advent of province-wide bargaining, therefore it could only cede its non-ICI bargaining rights to the Association. By virtue of the 1978 amendments to the bargaining schemes in the construction industry, local associations like the Sarnia Construction Association were given the opportunity to participate in province-wide bargaining through designated Employer Bargaining Agencies. The SCA took advantage of that opportunity and became a constituent member of the Labour Relations Bureau. Thereafter, the SCA members were bound by the ICI agreements reached by the designated EBA, and the Sarnia Construction Association regularly reminded all its members of their obligations as full members of the Association. The SCA also indicated specifically to new members, including Anthes in 1983, that they were bound by all collective agreements negotiated through the Association on behalf of its members.

66. We adopt the findings made by the Board in *Great Lakes Fabricating*, cited above, wherein the Board held it was not necessary for the applicant to have been certified as the bargaining agent for the employees of Great Lakes Fabricating for the employer to be bound to the collective agreement with that bargaining agent. The Board found in that case that full membership in the Sarnia Construction Association meant that the employer was bound by the SCA by-laws and was bound to the collective agreements reached by the SCA. Having found that UMACS is also bound by the by-laws of the SCA, we have no difficulty finding that even though the Labourers do not have a certificate with UMACS and have not been directly voluntarily recognized as the bargaining agent for UMACS employees, nonetheless, this employer is bound by the provincial ICI collective agreement. In any event, section 139(2) of the Act deems that an employer, who is represented by a designated or accredited employer bargaining agency, has recognized all of the affiliated bargaining agents represented by an employee bargaining agency with whom that employer bargaining agency is negotiating, for employees working in the ICI sector. By virtue of section 145 of the Act, a designated or accredited employer bargaining agent is vested with all the rights, duties, and obligations under the *Labour Relations Act* of the employers it represents for the purpose of conducting bargaining and concluding a provincial collective agreement.

67. Having decided this matter as outlined above, we do not need to address the applicant's alternate argument that the local Construction Maintenance Work agreement has a "pick-up" clause which acts to bind the employer to the provincial ICI agreement.

68. Since the Act does not allow an employer being bound by the provincial ICI agreement in only one area of the province, UMACS, if bound in Sarnia, is bound in the whole province of Ontario. As we have found that UMACS is bound to the provincial ICI agreement, it is necessary to determine the estoppel issue raised by the responding party.

69. We agree with the responding party that the union's evidence with respect to the Windsor area is of little assistance to us in determining the extent of the estoppel. However, we do not agree with the responding party that the Board should impose an indefinite period for the estoppel to run, or alternatively, that the Board should impose an estoppel until after the next provincial ICI collective agreement has been concluded. The Board finds the suggestion of an indefinite estoppel untenable in this case, as such an estoppel would be more akin to a penalty, which is unwarranted. The purpose of an estoppel running till the end of a collective agreement is that the parties can then be in a position to bargain for changes to the collective agreement, which they may

have been deprived of doing mid-term in the agreement when one party had decided to revert to the application of its strict legal rights.

70. However, we are not disposed to this result. First, the provincial bargaining scheme is such that it is unlikely UMACS could itself have any meaningful negotiations directly with the Labourers' Union at the end of the term of the present ICI agreement. But, more significantly, estoppel is an equitable concept utilized in appropriate circumstances to fashion a fair and appropriate remedy. Here, there is little reason to immunize the employer from its legal obligations until the agreement has expired. All that is truly "suffered", because of the union's lack of insistence on its legal rights, is that UMACS has been able to conduct affairs without regard to the provincial agreement. Once on notice that the union will be insisting on its legal rights, and thus once in a position to make informed decisions about future costs and methods of operating, there appears to be little reason to decline to apply the terms of the provincial agreement. We therefore see no virtue in imposing an estoppel to run to the end of the present ICI collective agreement.

71. The responding party was put on notice of the province-wide claims of the union when the union filed its first grievance in early 1994. However, the union chose not to pursue that grievance, or another grievance filed in April, 1994. The grievance which is the subject of this case was filed on June 27, 1994. Hence, since at least June, UMACS has known of the union's claim. This matter did not come on for hearing until the end of September 1994. We have considered the amount of time that UMACS has known about its alleged obligation under the provincial ICI agreement, and the absence of any cogent evidence of prejudice to UMACS as a result of the union's failure to assert its provincial bargaining rights. The one area of prejudice which was asserted by counsel for UMACS which we would like to address is the assertion that had UMACS known of the bargaining rights sooner, it could have withdrawn from membership in the Sarnia Construction Association. Being bound by the terms of a collective agreement is not like joining a club - one cannot simply withdraw whenever one no longer wants to participate. We cannot see how, if UMACS had found out earlier, it could have extricated itself from being bound by the collective agreements entered into through the Sarnia Construction Association. In our view, it was UMACS' responsibility, prior to making its purchase of Anthes Equipment, to make whatever inquiries were necessary to find out what obligations and employment relationships Anthes had, and what UMACS would inherit if it purchased that company. There is no dispute that Anthes was the predecessor employer to UMACS. Since Anthes was the predecessor employer bound, through the SCA, by the provincial ICI collective agreement with the Labourers, so UMACS stepped into the shoes of Anthes as the successor employer. Withdrawing from membership in the Sarnia Construction Association would not have negated UMACS' relationship to the Labourers.

72. In this case, we are of the view that the appropriate time frame for the estoppel is in reference to the date of issuance of this decision. Thus, any contracts which UMACS had bid on or any projects commenced prior to the date of this decision may be completed in the manner to which the employer had already committed. However, any work tendered and received after the date of this decision would have to be done in compliance with the responding party's obligations under the provincial ICI agreement with the Labourers' International Union of North America. Our intent is that the terms of the agreement are to be applied to work obtained after the issuance of this agreement.

2113-94-R International Association of Machinists and Aerospace Workers, Applicant v. **B A Banknote** a division of Quebecor Printing Inc., Responding Party

Bargaining Unit - Certification - Security Guards - Union applying to represent employer's security guards - Union already representing employees of employer in one of ten existing bargaining units - Board rejecting employer's argument that bargaining unit of security guards inappropriate if represented by any of various bargaining agents already representing other company employees, but particularly the applicant - Certificate issuing

BEFORE: *Bram Herlich*, Vice-Chair.

APPEARANCES: *James Reid* and *Willian Pequegnat* for the applicant; *Daniel J. Shields*, *Tim Tierney* and *Bob Wood* for the responding party.

DECISION OF THE BOARD; November 8, 1994

1. This is an application for certification.
2. The Board is satisfied that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act* (the "Act").
3. The parties agreed that, subject only to the single issue raised by the responding party (also referred to as the "employer" or the "company"), the union was in a position to succeed in its application.
4. The applicant (also referred to as the "union") in this case already represents employees of the employer in one of some ten existing bargaining units. The instant application pertains to a proposed unit composed of security guards. While the employer does not generally dispute the propriety of having a separate bargaining unit exclusively for its security guard employees, it asserts that a bargaining unit of such security guards is inappropriate if it is to be represented by (any of the various bargaining agents already representing other company employees, but particularly) the applicant. The employer argues that in what it characterizes as the exceptional and extreme facts of this case, the Board, essentially because of concern for serious conflict of interest problems, ought to dismiss the present application.
5. At the outset of the case, counsel for the employer outlined the facts upon which it relied in support of its position. After reviewing those facts and a number of documents tendered, the union agreed to the truth of the facts as outlined by the employer, a number of documents were marked as exhibits on consent of the parties and the Board proceeded to hear the parties' final submissions.
6. As the facts are not in dispute, it is unnecessary to set them out in elaborate detail and we offer only the most essential outline of those facts.
7. The instant application concerns one of the four divisions of Quebecor Printing Inc., B.A. Banknote, which is located at 975 Gladstone Ave in the city of Ottawa (and at a facility located in Montreal and not relevant to these proceedings). At the Ottawa facility the employer is engaged in two broad functions: the first relates to the printing of currency, postage stamps, and travellers' cheques-clients include Canada Post and the Canadian as well as other national governments; the second function involves the printing of passports for the appropriate Canadian Government department. All of these functions and particularly those related to the passport functions

are highly security sensitive. To the extent that the employer is involved in the production of highly valuable commodities, all of its clients demand high levels of security. In this respect, contracts the company enters into may provide for a full indemnity to the client in the event of any theft or misappropriation of goods while in the company's possession. Any inability on the part of the company to provide security satisfactory to its clients' demands could impact on its volume of business.

8. The 7 security guards the union seeks to represent play an important role in providing the security so important to the company's operations. The company's facility is surrounded by a fence which, like the building, is further insulated by razor and barbed wire. The security guards, who provide coverage on a 24 hour per day basis, are cleared to a security level which Supply and Services Canada describes as "SECRET" and monitor all entrances to and exits from the plant at a controlled gate and will perform searches of employees as necessary or at random. They perform internal and external video surveillance and conduct scheduled and random patrols of the facility designed, at least in part, to monitor the activities of other employees. In the event of any wrongdoing on the part of employees apprehended by the security guards, the latter will be involved in the grievance and arbitration process on behalf of the employer. The security guards are also responsible for programming the card readers used to permit employee access to various locations in the facility as appropriate and for monitoring the wearing of the related access cards which also serve as employee identification cards.

9. The employer is not a stranger to collective bargaining. Due apparently to the involvement of a number of different skilled tradespeople, there is a multiplicity of bargaining units and agents involved in the employer's operations. While we were not provided with comprehensive and complete bargaining unit descriptions, there was no dispute that the essential contours of the employer's collective bargaining landscape are as follows:

- (a) A bargaining unit of approximately 24 employees who print bank notes are represented by what was described as a steel plate printers union, identified as Local 6 of the International Plate Printers Die Stampers and Engravers Union of North America
- (b) A bargaining unit of approximately 6 employees who work as engravers are represented by what was described as a steel plate designers and engravers union, also identified as Local 6 of the International Plate Printers Die Stampers and Engravers Union of North America
- (c) A bargaining unit of approximately 3 employees who do finishing work are represented by what was described as a steel plate finishers union, also identified as Local 6 of the International Plate Printers Die Stampers and Engravers Union of North America
- (d) A bargaining unit currently devoid of any employees includes examiners of notes who are represented by what was described as a steel plate examiners union, identified as Local 31 of the International Plate Printers Die Stampers and Engravers Union of North America
- (e) A bargaining unit of approximately 6 employees employed as cutters and represented by Graphic Communications International Union, Local 588
- (f) A bargaining unit of approximately 25 employees employed as exam-

iners and represented by Graphic Communications International Union, Local 588

- (g) A bargaining unit of approximately 18 employees employed as lithographers and represented by Graphic Communications International Union, Local 588
- (h) A bargaining unit of approximately 17 employees employed as porters and paperhangers and represented by Graphic Communications International Union, Local 41M
- (i) A bargaining unit of approximately 2 employees employed as stationary engineers and represented by the International Union of Operating Engineers
- (j) A bargaining unit of approximately 6 employees doing letterpress and represented by an employee association
- (k) A bargaining unit of approximately 12 maintenance employees represented by Lodge 412 of the present applicant.

10. The employer rested its argument that the bargaining unit being sought was not appropriate on two broad themes: conflict of interest and fragmentation. Although, at the limit, there may not be a meaningful distinction between the two arguments in this case, we shall deal with them separately.

11. The number of bargaining units already in place must be measured in double digits; there is little doubt that adding another will not reduce any existing fragmentation difficulties. In terms of crafting bargaining unit configurations, however, the only option which would minimize fragmentation is not available in this case. The union is not seeking to combine its new unit of security guards with its existing unit of maintenance employees and neither is the employer, despite its apparent concerns about undue fragmentation, seriously arguing that the application of section 6(6) of the Act should result in security guards being placed in a bargaining unit with other employees. The employer's concern over conflict of interest issues clearly outweighs any concerns it has about undue fragmentation. Indeed, and as discussed with the parties at the hearing, a cursory review of the employer's existing bargaining structure suggests that there may be more direct and effective means to deal with the employer's concerns about the proliferation of bargaining units, than by advancing the position the employer asserts in these proceedings.

12. Finally, in an effort to bolster its argument related to fragmentation, the employer suggested that certification of the applicant (as compared to the certification of a bargaining agent not already representing company employees) would exacerbate the deleterious effects of fragmentation. While one might normally assume that a multiplicity of bargaining agents would in fact not be the ideal way to mitigate the effects of fragmentation, it became clear that the employer's submissions in this regard were tied to the fact that the employees in question are security guards. In other words this last argument is really a restatement of the employer's primary conflict of interest argument. If the security guards are to be certified, the employer, for conflict of interest reasons, does not want them represented by a bargaining agent which also represents other of the company's employees.

13. This then brings us to a consideration of the company's primary argument.

14. Before what are generally referred to as the Bill 40 (S.O. 1992, c.21) amendments section 12 of the Act provided as follows:

The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

15. There is little doubt that, under the terms of this former section, the company could well succeed in its opposition to the certification of the applicant. The section, having been repealed, is, however, no longer found in the statute. In its stead we find section 6(6) which provides:

6.-•••

(6) A bargaining unit consisting solely of guards who monitor other employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining,

- (a) if the applicant trade union or the employer requests that the Board do so; and
- (b) if the Board is satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor.

16. The company argues that notwithstanding the very specific wording of this section, the Board still retains, under section 6(1), a residual authority to determine the appropriate bargaining unit. It appeals to the Board, in view of the expressed concerns regarding security, conflict of interest and fragmentation, to find that the proposed bargaining unit is not appropriate and to therefore dismiss the application.

17. There are several reasons why the Board finds itself unable to accede to this request. First of all, although the argument purports to rely on section 6(1) of the Act, the company is really asking the Board to determine that the applicant is an inappropriate bargaining *agent*, not that the proposed unit is an inappropriate bargaining *unit*. The employer concedes that the proposed unit is appropriate so long as employees within it are represented by a trade union other than the applicant (or those other trade unions already representing company employees). There is simply no statutory authority (like the former section 12 or the existing section 13) which allows the Board, on the facts of this case, to find that the applicant is ineligible for certification in respect of the proposed bargaining unit.

18. Not unrelated to this concern, and perhaps more central, is the Board's view that to give effect to the employer's submissions would be to turn a deliberate blind eye to the recent amendments. The Board has commented as follows, in *The Municipality of Metropolitan Toronto*, [1994] OLRB Rep. June 795 at paragraph 17 et seq., on the revisions to the statutory scheme:

... The most obvious change is that there are no longer any restrictions on the ability of trade unions to represent guards or, put in the language of the last quoted Board decision [*Wells Fargo Armcar, Inc.*, [1981] OLRB Rep. July 1046], the previous limits on an employee's free choice of what trade union will represent him in collective bargaining have been removed ... the legislature, in its wisdom, has determined that where a conflict of interest exists the appropriate response is not to limit a guard's selection of bargaining agent, but rather to simply deem a bargaining unit consisting solely of such guards to be appropriate for collective bargaining. It is not

for the Board to determine in any particular case whether the resulting "guards only" unit will eliminate or seriously reduce the potential for conflict of interest.

19. It was not seriously disputed that the monitoring of other employees done by the security guards who are the subject of the instant application would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor. Accordingly, section 6(6) directs (through its mandatory language) the Board to find a bargaining unit consisting solely of such guards to be appropriate. And while section 6(1) of the Act does contemplate the Board's general obligation to determine appropriate bargaining units, the Board is not prepared to rely on that general section to the exclusion of the specific and mandatory language of section 6(6).

20. Finally, we shall briefly address another concern raised by the employer. It was suggested that since the Board has yet to consider conflict of interest as a factor militating against or preventing a successful combination application, granting the instant application might result in the applicant doing indirectly that which section 6(6) prevents it from doing directly. In other words, there would be nothing to prevent the applicant, if successful here, from subsequently applying to combine this new guards unit with an existing employee unit. It has never been the practice of the Board to provide advance rulings and in that context it is perhaps inappropriate for us to dwell on this point. It does appear to us, however, that the existence of a conflict of interest which resulted in the application of section 6(6) in a certification context would be presumptively relevant to the Board's deliberations under section 7(3) in a subsequent combination application. Indeed, the employer in *The Municipality of Metropolitan Toronto* case, cited above, has argued that the existence of a section 6(6) type conflict of interest ought to be dispositive and bar any combination application involving security guards. (A more recent unreported decision in that case (dated August 3, 1994) indicates that case is continuing before the Board.)

21. In view of all of the above and having regard to the partial agreement of the parties, the Board is satisfied that:

all Security Guards employed by B A Banknote a division of Quebecor Printing Inc. at 975 Gladstone Avenue in the City of Ottawa, save and except Security Supervisors and persons above the rank of Security Supervisor,

constitute a unit of employees of the company appropriate for collective bargaining.

22. Having further regard to the agreement of the parties and the evidence filed in this matter, the Board is satisfied that more than fifty-five percent of the employees of the responding party in the bargaining unit described above had applied to become members of the applicant on or before September 12, 1994, the certification application date.

23. A certificate shall issue to the applicant in respect of the bargaining unit described above.

0262-94-R United Steelworkers of America, Applicant v. Bannerman Enterprises Inc., Responding Party v. Group of Employees, Objectors

Certification - Charges - Employee - Employer Support - Evidence - Membership Evidence - Board determining that employee who initiated union organizing campaign not managerial nor employed in position confidential to labour relations and that section 13 of the Act having no application - Evidence not indicating that membership evidence unreliable as indicator that more than 55% of employees in bargaining unit had applied to be union members at date of application - Certificate issuing

BEFORE: *K. G. O'Neil*, Vice-Chair.

APPEARANCES: *P. Turtle* for the applicant; *A. P. Tarasuk* for the responding party; *C. J. Abbass* and *Sandy Menard* for the group of employees; *J. Bowers*, *L. Judd*, *V. Peters*, *S. Swiergosz*, *R. Taylor* and *H. Zielkie* on their own behalf on some days of hearing.

DECISION OF THE BOARD; November 8, 1994

1. This is an application for certification in which the Board issued a decision certifying the applicant on August 19, 1994 with reasons to follow. These are the Board's reasons.
2. For ease of reference, the applicant will sometimes be referred to as the union or the Steelworkers, while the responding party will be referred to as the dealer or the employer.
3. Subsequent to the release of the August 19, 1994 decision, but prior to the release of these reasons, the Board received a request for reconsideration from the objecting employees and employer. This included a request that they be allowed to file additional submissions within a time period of thirty days from the reasons' being released. If the employer or objecting employees wish to do so, the Board will consider such further submissions in support of their requests for reconsideration, if they are received within thirty days of the receipt of these reasons.
4. This case involved 27 days of hearing. The Board heard the evidence of nine witnesses and submissions made throughout the proceedings, all of which I have considered thoroughly, whether or not set out below in detail.

The Background

5. Ross and Julie Bannerman operate a Canadian Tire store in Kirkland Lake, which they took on in March, 1994. The departing dealer, Brian Draves, left to operate a larger store in St. Catharines. The uncertainty associated with this change lead Carolyn Rutetzki, an office worker in the Kirkland Lake store, to contact the union to organize the store in mid-April 1994.
6. There are thirty-seven employees on the list for the purposes of the count. The union filed current membership evidence in the names of 64% of those employees, enough to warrant automatic certification if the Board relied on the membership evidence as a reliable indicator of the wishes of the employees involved. There was some suggestion from some of the objecting employees that the union only had the support of part-time employees and students, but the actual situation is that the union had the support of over 55% of both the full-time and the part-time employees considered as separate groups as well. As there are only 11 part-time employees on the list of 37 employees, the union could not have been in a certifiable position in a bargaining unit

composed of both full-time and part-time employees with support from only the part-time employees.

7. The objecting employees and the employer urged the Board not to rely on the membership evidence filed, and to dismiss the application or order a representation vote. It was argued that Carolyn Rutetzki, who initiated the organizing campaign, was a managerial employee and/or employed in a position confidential as to labour relations, and should be excluded from the bargaining unit. On the basis of her managerial status, it was argued that the application should be dismissed, as section 13 of the *Labour Relations Act* precludes the Board's certifying a union if the employer has participated in its organization. As well, it was alleged that Ms. Rutetzki and Steve Yee, who assisted her in collecting some signatures, had made misrepresentations, threats, intimidating and coercive statements, which rendered the membership evidence unreliable as an indication of the wishes of the employees. Reinforcing this submission was the argument that Ms. Rutetzki had used her position as an office employee, with perceived or actual managerial or confidential status, to unduly influence the employees who signed cards. The representations made and the manner in which the campaign was conducted were argued to create sufficient doubt as to whether the true wishes of the employees were disclosed by the cards submitted that a confirmatory representation vote should be ordered at the very least. We will deal with each of the issues in turn.

The status of Carolyn Rutetzki

8. The objecting employees took the position that Carolyn Rutetzki was a managerial employee, and perceived as such, while the employer took the position that she was employed in a confidential capacity in matters relating to labour relations. At the hearing, which took place after the count had been released through the waiver process, the employer also attempted to take the position that Ms. Rutetzki and the head cashier were managerial. The Board did not allow the employer to resile from the position taken during the waiver process. See, among others, *Cor Jesu Re-education Centre of Timmins Inc.*, [1992] OLRB Rep. March 298.

9. The Board agreed to hear the evidence relating to Ms. Rutetzki's duties and responsibilities directly rather than referring the matter to a labour relations officer for examinations because it appeared that the evidence on the issue of whether there was employer participation in the organization of the union was inseparable from the evidence on whether Ms. Rutetzki exercised managerial functions. During the course of the hearing, the parties agreed that the evidence of the period up until March 24, 1994 would govern the application for the purposes of Ms. Rutetzki's status.

10. In the August 19, 1994 decision, the Board found that Ms. Rutetzki was an employee for the purposes of the Act. Our reasons in each of the categories of the exercise of managerial functions and employment in a capacity confidential as to labour relations follow.

Did Ms. Rutetzki exercise managerial functions?

11. It is common ground that Ms. Rutetzki had no role in hiring or firing employees, setting wages, doing payroll, or scheduling employees which are all salient in the Board's jurisprudence as indicators of managerial functions. Rather it is argued that the depth of her involvement with the financial side of the store operation and functions which are argued to be disciplinary, such as monitoring of employees as to cash shortages, and correcting other employees on matters such as paperwork procedure, justify a finding that she is managerial.

12. As the Board stated in its earlier decision, Ms. Rutetzki's duties and responsibilities involve some supervisory functions and regular reporting functions. However, what separates her duties and responsibilities from those the Board has found to be managerial in other cases is the absence of independent decision making power and discretion. Further, the evidence about her reporting functions did not indicate that she had the powers of effective recommendation. In sum, Ms. Rutetzki had a considerable amount of autonomy and responsibility, but did not exercise managerial authority. The Board based these findings on the application of the Board's case law to the facts of this case. We will briefly refer to that case law and then review the facts.

13. The Board's jurisprudence on supervisory employees and those with significant responsibility has shown that it looks for the actual exercise of significant managerial functions or effective recommendation before excluding employees from the ambit of the Act. The core of the issue is whether the duties exercised are such as to put the employee in a position of conflict with the duties owed to the employer as a manager. Given the purposes of the Act, the Board will not lightly deprive an employee of the coverage of the Act.

14. For example, in the Canadian Tire store in Collingwood, a person who supervised four full-time employees and the operation of the hardware department was found not to be managerial. In its decision reported as *Ken Bodnar Enterprises Inc.*, [1994] OLRB June 688, the Board noted the employee's higher level of responsibility and autonomy than those she supervised, but posed the question as whether her duties were of such a nature as to preclude her from enjoying "employee" status under the Act. The Board noted the particular significance of a person's role in hiring, firing and disciplining and had this to say at para. 35 about analysing that evidence:

... Central to this analysis is whether the individual in question actually makes decisions or otherwise exercises an independent discretion with respect to matters relating to earnings levels or job security, and that in the process of doing so, the person exercises an "effective control" over employees. For this reason, the Board has long held that the mere conveyance of information to or from the employer, the routine performance of tasks requiring little in the way of independent exercise of discretion, or the coordination of efforts of other employees is not *per se* a "managerial function" as contemplated under section 1(3) of the Act. (*Borough of Etobicoke*, *supra*; *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84.) Similarly the making of recommendations with respect to decisions on such matter as hiring, firing, discipline and promotion are significant only if effectively followed by the person's superiors. (*Oakwood Park Lodge*, *supra*.)

15. See also *The Corporation of the Township of Innisfil*, [1994] OLRB Rep. January 76, at para 32 where the Board said "...the fact that [an employee] raises mistakes in performance with the employees or with the Direction, in the absence of evidence of some greater involvement in a disciplinary process, only suggests that he is conscientious with respect to the performance of the work in his department." To similar effect see, *RCA Limited* [1980] OLRB Rep. Sept. 1316.

16. As was made clear in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, co-ordinating functions alone are not sufficient to exclude one from collective bargaining and the fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.

17. Consultation and democratic decision making does not necessarily mean that real managerial authority has percolated downward. The recommendations need to be decisive; input should not be confused with decision-making. In *Ottawa General Hospital* [1984] OLRB Rep. Sept. 1199 the effective recommendation test was put this way at pg. 1204: the issue is whether "the person making the recommendation is, if not the actual decision-maker, then the one decisively influencing that decision and thereby exercising a significant influence over the livelihood or economic des-

tiny of his co-workers.” As was pointed out in *Red Cross Society* [1991] OLRB Rep. February 163, the fact that input is treated seriously does not necessarily amount to effective recommendation. Similarly, see *York University* [1975] OLRB Rep. Dec. 945 where the Board pointed out that its task is to separate the effective and the meaningful exercise of managerial authority from the supportive and supplemental functionalities without whom prudent decisions could not be made. The Board there referred to the review of the tests applied by the Board in distinguishing between real decision making authority and the collators and conduits of information in the supervisory contexts in *McIntyre Porcupine Mines Ltd.* [1975] OLRB Rep. April 261. In that case a person spending a majority of her time attending to administrative duties in support of the chairman and the balance in the exercise of supervisory duties was found to be in the bargaining unit.

18. The fact that a person generates work for another to complete is not sufficient to make a person managerial, nor is the fact that they are consequently in a position to assess performance enough to make a person managerial. See *Township of Innisfil*, at para. 35 cited above. See also *Ottawa General Hospital*, cited above, where the Board refers to the role of semi-autonomous work groups which include a variety of individuals with lower level of skill, and finds that the fact that a person performs an assigned role as teacher and trainer, a role which inevitably involves some degree of evaluation, as with journeymen and apprentices, does not of itself mean a person is managerial.

19. Turning to the factual context, the administrative structure was headed by the dealer, Mr. Draves. The General Manager, Mr. Wickens, reported directly to Mr. Draves; Ann Wickens, his wife, performed the payroll functions. There was also a floor Manager, Tammy MacDonald, and department heads, such as in hardware. In the office, besides Mr. Draves, there were two employees who worked there full-time, Carolyn Rutetzki and Faye Ranger. Ms. Ranger was responsible for data entry. Assisting Ms. Rutetzki part-time was Rose Godin, who also worked part-time as a cashier.

20. Ms. Rutetzki started at the store in 1990 as a cashier. By August, 1991 she had been given part-time responsibilities in the office to assist Debbie Laurier, the full-time office worker. By March 24, 1994 when Mr. Draves left, Ms. Rutetzki was responsible for most of the financial paperwork in the office, which included balancing various accounts and reconciling figures so they could be forwarded to an accountant, who prepared a profit and loss statement which was returned to Mr. Draves in a sealed envelope. She also dealt with other office matters such as receipts for boots and benefits as well as the distribution of uniforms.

21. Ms. Rutetzki had overall responsibility for balancing cash on a monthly basis, and was the employee who did cash balancing most frequently on a daily basis as well. However, both Rose Godin and Hazel Gillett, the head cashier, also did daily cash balancing. This function involves ensuring that each cashier's figures balance, and trying to track down the reason for overages and shortages, which are daily occurrences. Ms. Rutetzki was very good at the tracking down side of this, which requires a sense of what might have gone wrong. In discussions with the cashier in question, one can “solve” the shortage or overage. It was the duty of the person cash balancing to report to Mr. Draves any unsolved shortages and overages. When Ms. Rutetzki did this reporting, she often offered a theory on what was causing the problem, which Mr. Draves learned to trust, as it was frequently accurate.

22. It is clear that consistent shortages and overages can and do result in discipline up to and including discharge. Ms. Rutetzki's role in reporting shortages is said to intimately involve her in discipline of employees. On balance we are of the view that this is really a quality control type of function. The fact that it deals with money, and is an essential function to the operation of the

store, does not elevate it to managerial or make it a discipline function. Neither Ms. Rutetzki nor the other employees who cash balance and report to the dealer had any discretion about whether to report the shortages and overages or any control over what happened afterwards. There was also evidence that the general manager or the head cashier talked to the employee about overages and shortages once they had occurred, separately from the advice of the existence of an overage or shortage for which the person balancing cash was responsible. Ms. Rutetzki's function was largely to find out if the shortages were "real", i.e. whether there was an explanation that would make the cash tray balance, such as that the employee had made change improperly for another cashier, which would result in a mirror overage and shortage which would cancel each other out. Mr. Draves' evidence also made clear that the cash balancing and reporting was all within the context of well structured daily procedures.

23. Several specific examples of discipline up to discharge were given some of which were based on information from reports from Ms. Rutetzki on shortages and overages. In one of these Ms. Rutetzki developed a hunch that the shortages were consistent with borrowing from petty cash and paying it back, and in another with taking cash outright, which she reported to Mr. Draves. In the former example, Mr. Draves asked her to keep an eye on petty cash. She suggested balancing twice daily, and did so. In another example, when Mr. Draves suggested recording the serial numbers of the cash put in a certain cashier's drawer, and Ms. Rutetzki suggested photocopying the money, Mr. Draves accepted her idea. Although this involvement was referred to by employer counsel as "a serious managerial function", we do not agree. This is because it is Mr. Draves who was making the decisions which affected the employee's job. Ms. Rutetzki was intelligently assisting with how to best track the cash. It is not that there was no consequence to the employee from the information; the point is that Ms. Rutetzki did not determine what that consequence would be. Illustrative of this is that when Ms. Rutetzki put the photocopies of the bills on Mr. Draves desk, he then held a closed door meeting with Mr. Wickens and Ms. MacDonald, to determine what to do. He did not include Ms. Rutetzki in this discussion. Similarly, when Ms. Rutetzki made sure the last person out of the office balanced the cash when trying to track the cash float of another employee, counsel argued these were instructions which are the mark of a managerial employee. We consider it rather part of her cash tracking duties which were essentially reporting duties and not decision making or effective recommendations. As indicated above, she had no discretion whether to report or not, nor any control over what happened as a result of the information she provided.

24. Ms. Rutetzki had a role in training new cashiers which was apparently shared by all cashiers with experience. While the new cashier was learning, she would be paired with a more experienced one. We do not find this to be managerial, but rather the sharing of experience.

25. Mr. Draves described Ms. Rutetzki as providing information on cashier's accuracy and capacity and informed Mr. Bannerman that she was, with the floor manager, a good source of information on the capacities of employees. Indeed, Ms. Rutetzki apparently offered her opinion on employees much more often than others to Mr. Draves. It is clear that Mr. Draves and Ms. Rutetzki enjoyed considerable rapport and that Ms. Rutetzki "had his ear". They chatted daily, apparently about every subject under the sun. What is important to the Board's determination is that no decision making authority went with this. Mr. Draves listened and sometimes did things consistent with Ms. Rutetzki's opinion, and sometimes did not. For example, an employee with an absenteeism problem had an impact on how often Ms. Rutetzki had to relieve on cash, which sometimes put her behind in her office work. Ms. Rutetzki complained of this, (others had complained of the impact on their work as cashiers as well) and wondered out loud why Mr. Draves kept her on. He explained why and took no action. On another occasion, when Mr. Draves had

himself become impatient with the same issue, and she suggested the eve of an impending maternity leave was not the time to take action, he agreed.

26. There was some difference between the evidence of Mr. Draves and Ms. Rutetzki about whether she was obliged to offer these opinions, and whether she was aware they were being relied upon, but in the end the difference is more degree than substance. Even if one relies on Mr. Draves' evidence alone, it is clear that there was no confusion in his mind about who made the decisions in regards to discipline. It was Mr. Draves or Mr. Wickens in the cases to which we were referred. That he valued Ms. Rutetzki's input because he had come to trust her judgement does not make her managerial, or the effective decision maker. There were a number of examples which make it abundantly clear that Mr. Draves weighed Ms. Rutetzki's opinions with all the other information at his disposal and made decisions of his own, which often did not coincide with Ms. Rutetzki's. The incidents to which reference was made about discharges following reporting by Ms. Rutetzki are ones where there was no doubt about the result if the facts were proven; she made no independent judgement to fire, or even to recommend firing. She reported the information she was required to record and report, which she had no discretion to withhold.

27. It is important to keep in mind that many modern management styles emphasize an "open door policy" and keeping on top of employee complaints. This usually involves encouraging employees to report to managers their dissatisfactions or suggestions for improvement. It would be curious indeed if the fact that management sometimes acted on complaints or suggestions garnered in this manner made the people who made them managerial. One of the things that can make someone managerial is the right to decide whether or not to act on complaints or suggestions affecting others' conditions of employment. This is the aspect that was conspicuously absent from the evidence about Ms. Rutetzki's duties and responsibilities.

28. In her cash balancing and other paperwork duties, Ms. Rutetzki often had to track down paperwork missing from other employees, cashiers in particular. There were times when, apparently impatient with others for not having had the paperwork where she considered it should have been in the first place, Ms. Rutetzki was less than diplomatic in retrieving the material. For instance, Ms. Peters, one of the objecting employees, said Ms. Rutetzki had "torn a strip off her" for not doing a procedure properly, or given her a "tongue lashing" for having a cash shortage when she had worked as a cashier. However, there is no evidence that these exchanges affected the work record of the employee on the receiving end. Having considered the evidence in its totality, the Board is of the view that this type of incident is properly seen as the product of an unfortunate part of Ms. Rutetzki's strong personality. It is clear that Ms. Rutetzki has many strengths, but tact when impatient is not one of them. However, this does not make her managerial, in light of all of the other evidence.

29. It was argued that incidents such as those above showed that Ms. Rutetzki regularly meted out the first rung of discipline. This was argued to be most clear with Ms. Godin, who assisted her part-time in the office. Mr. Draves testified that Ms. Rutetzki had authority to discipline Ms. Godin. However, the rest of the evidence does not support that Ms. Rutetzki actually did discipline Ms. Godin. Nor is there any evidence that she was actually informed that she had such authority. The Board's jurisprudence is clear that unexercised authority is not the standard that the Board uses in the face of the statute's words "exercises managerial functions".

30. It is not disputed that Ms. Rutetzki and Ms. Godin had "words" in the office; Ms. Godin found these exchanges so one-sided as to not constitute a discussion. Ms. Godin described other exchanges as "we would talk it over" or "we were arguing the amount". Ms. Rutetzki felt she was spending too much time going back over Ms. Godin's work and grew impatient with Ms.

Godin's progress in the office. She complained of this to Mr. Draves, who had assigned the task of training Ms. Godin to Ms. Rutetzki when Ms. Godin was first assigned to the office in the fall of 1992. Part of the training involved deciding when to cover a certain topic, when to report lack of success to Mr. Draves, and the responsibility to evaluate and correct Ms. Godin's work. It is clear that Mr. Draves took the complaints at least as much as a comment on Ms. Rutetzki's training abilities as on Ms. Godin's suitability for office work. No discipline resulted to either Ms. Rutetzki or Ms. Godin. He suggested a variety of things, and asked Ms. Rutetzki for suggestions as to a replacement. Interestingly, none were forthcoming. What was crystal clear was that Mr. Draves was balancing all the information he was receiving on the situation, and at no time delegated or surrendered the decision making discretion to Ms. Rutetzki. In fact, Ms. Rutetzki grew impatient with Mr. Draves' lack of action on her complaints.

31. In the case of Ms. Godin, as with others, Mr. Draves took Ms. Rutetzki's input seriously, but did not, on the evidence, regularly follow her suggestions at the level that would make them effective recommendations as to discipline. The evidence is clear that he had never directed Ms. Rutetzki to carry out discipline he had decided on, as he did with Mr. Wickens or Ms. MacDonald. The fact that Ms. Rutetzki was informed about discharges and the reasons for them in some cases before others is also not an indication of managerial status where she did not participate in the decision making. The fact that she had to be informed of the reasons is in itself an indication that they were not her reasons but someone else's.

32. In argument, Mr. Tarasuk suggested that the test for deciding whether discipline was given out to Ms. Godin was whether the employee was made aware of the consequences if she failed to improve. There is no evidence that Ms. Rutetzki's criticisms of Ms. Godin ever carried with them a threat of consequence. The fact that Mr. Draves did not stop Ms. Rutetzki from correcting employees is argued to indicate that she had managerial authority directly from him. However, the totality of the evidence suggests otherwise. For one thing, Draves had spoken to her about how she spoke to other employees; he did not find her manner appropriate. Further, we do not find the evidence goes beyond showing that she played the role of an experienced and skilled employee in showing others how to do things. The fact that she did this abruptly or arrogantly at times, or that she "carried herself as if she had authority", does not make her managerial. The important fact is that her speaking to other employees did not result in negative consequences to the employment record, on the evidence in this case.

33. Ms. Rutetzki clearly supervised Ms. Godin; this included assigning work. However, given the limitations on her role generated by the close proximity of Mr. Draves, and the fact that he reserved the decision making to himself in regards to Ms. Godin's status and abilities, we do not consider the supervision of one employee truly managerial. It was rather more consistent with Ms. Rutetzki's skill and experience at the work in the office.

34. At one point Mr. Draves described Ms. Rutetzki's function in the office as very similar to the function his wife had played, with the exception that his wife did payroll and not much cash balancing. As to the difference between Ms. Laurier, who came into the office when Mrs. Draves left the office, and Carolyn Rutetzki, he said that the difference was attitude and rapport. Counsel for the employer argued, on the basis of this evidence, that Ms. Rutetzki was playing the role Mr. Draves' wife had played in the office to the extent that she was his alter-ego, the joint decision maker. We do not find that the evidence goes that far. Firstly, one cannot ignore the fact that Mrs. Draves owned part of the business, while Ms. Rutetzki is an employee who looked on a wage of \$9.80 an hour as something to aspire to. Thus, Ms. Rutetzki, from a point of view of conflict of interest, cannot accurately be compared to someone who is a part owner of the business. Moreover, the fact that payroll was not done by Ms. Rutetzki as it was by Mrs. Draves, is telling, and

will be referred to further below as to our finding that her status was not confidential as to labour relations. It is a function that was reserved, both at the time of Mrs. Draves' presence and after, to people other than those holding Ms. Rutetzki's position. The comparison to Ms. Laurier, is also interesting. Ms. Rutetzki's assertive attitude, and her rapport with Mr. Draves, it appears, are the source of much of the feeling among some of the witnesses that Ms. Rutetzki might be managerial. It is not such personality factors which form the basis for the Board's determinations. It is rather the actual functions exercised, and a detailed analysis of their limitations or lack thereof.

35. At one point Mr. Draves put Ms. Rutetzki on salary with a small increase over her hourly wage because of her talent and to "show her she had a future." He paid for a word processing course at a local community college as well. We do not find either of these to amount to anything other than an expression of Mr. Draves' high opinion of Ms. Rutetzki's capabilities in office work. At no time were they accompanied by any delegation of managerial authority. We have the same view of the fact that Mr. Draves left Ms. Rutetzki to work on her own and report to him any problems. This was an expression of his trust in her abilities, but he never gave up any of his discretion as to what to do with the problems she reported. As to matters such as cash balancing, she had no discretion as to what to report; she was required to report the status of each cash tray.

36. Other duties of Ms. Rutetzki are consistent with the autonomy she had in the carrying out of her functions, but are not managerial in nature. These included more regular access to keys and locked areas than other employees and responsibility to keep track of uniforms and make bank deposits.

37. It was also argued that occasions on which Ms. Rutetzki spoke to Mr. Draves or other managers on behalf of other employees indicates she was managerial. By contrast, union counsel suggests it could be analogized to the activities of a union steward. In our view, this evidence is entirely equivocal. It is important to keep in mind that in a pre-collective bargaining situation, who is management and who is not is not normally given the attention that it is once a union is in the picture. In this light, Ms. Rutetzki's activities on behalf of other employees were most likely quite independent of any actual job function, which is what the Board looks at in determining status. Rather it appears they were a product of her assertive personality and her rapport with Mr. Draves.

38. On this issue, the Board did not find helpful general statements of employees who were not familiar with Ms. Rutetzki's duties, but, for example thought she was in management because she worked in the office, and dealt with uniforms. The perception issue raised on the basis of that type of evidence will be dealt with below with the issues relating to the reliability of the membership evidence.

Was Ms. Rutetzki employed in a capacity confidential as to Labour Relations?

39. The Board's considerations in determining whether a person is employed in a capacity confidential as to labour relations have their source in the same concern about conflict of interest as those referred to above concerning managerial status. The Board takes a detailed look at the duties to see if they are so materially related to labour relations as to require the employee to refrain from collective bargaining under the Act. We will refer to some of the examples in cases provided to us by the parties.

40. In *Frito-Lay Canada*, [1978] OLRB Rep. Sept. 831, the Board found that payroll clerks who collect and collate individual payroll information relating to individual employees were not privy to the employer's industrial strategy and thus should not be excluded from collective bargaining. By contrast, a member of the "finance team" in *York University*, [1975] OLRB Rep. Decem-

ber 945, who did costing for salary increment exercises and union proposals during negotiations, payroll purge exercises, and the writing of programme designs for them was exposed to information that is inherently confidential. As well a person who typed all the budget material for the comptroller and had access to financial statements was found to be so “intrinsically exposed to confidential information in matters that may directly or indirectly relate to labour relations as an integral part of her routine job functions that she ought to be excluded from the bargaining unit”. A person who typed proposals as to how to deal with grievances was also excluded. But secretaries typing material relating to tenure deliberations that were not confidential, since the person concerned knew about them, were not found to be excluded.

41. The union referred us to *RCA Limited* [1980] OLRB Rep. September 1316. In that case the Board dealt with five secretaries to senior company executives. The Board said that it must determine whether the information handled was sufficiently particular in respect of material labour relations information such as projected hirings, lay-offs, or wages as to raise the likelihood of a genuine conflict of interest. Those who handled material giving them knowledge of projected rates of increase were excluded. Those who did not handle that sort of material, but did deal with profit statements, performance appraisals, letters of discipline and long-range financial plans were not. The Board held that the business data they were privy to was too general to be of any particular value in collective bargaining, such as long-range business plans that appear to contain no particular statements about manpower requirements or wage estimates. The Board also dealt with a Cost Analyst who prepared statements analysing the performance of the plant in terms of material costs and labour costs incurred in producing. Characterizing this as essentially a reporting function that involved the gathering of data, the Board found that it did not involve any independent power of decision in policy formulation or in areas that affect the jobs or job conditions of employees and was thus not managerial. As well, because the focus of the employee’s involvement with manpower data was on the past, he was found not to be employed in a capacity confidential as to labour relations.

42. Another relevant case for the purposes of this determination is *Metropolitan Toronto Library Board* [1991] OLRB Rep. March 339. In that case a Public Relations Secretary was excluded as employed in a confidential capacity in matters of labour relations. She attended and took minutes of management meetings at which the settlement of grievances and collective bargaining might be discussed. As well she typed performance evaluations and prepared draft budgets and had access to draft proposals for collective bargaining. Ms. Rutetzki does none of these things. As the Board said in that case at para. 7:

Access to information which may be sensitive or confidential in some business or general sense is not, by itself, sufficient to cause an individual to be deemed to not be an “employee”. Similarly, access to personnel information is to be distinguished from access to confidential labour relations information. It is the labour relations content or potential for use in the collective bargaining or grievance resolution of information which is important for purposes of the Board’s considerations...”

43. See also *The Corporation of the Town of Innisfil*, [1994] OLRB Rep. January 76. In that case access to irregular discipline notes, and responsibilities for preparing invoices, reports, cheques, and even the payroll were not held to exclude the person from the bargaining unit, although access to all the labour relations files of the Town did warrant exclusion.

44. The employer referred us to *Spruce Falls Power & Paper Co. Ltd.*, [1980] OLRB Rep. January 110 in this area. This case dealt with employees with responsibilities for financial material, an area in which Ms. Rutetzki has duties and responsibilities as well. The Board noted at para. 3 that the involvement with matters relating to labour relations must be regular and an integral part

of the employees' duties, and it must be material which would prejudice the employee in the sphere of labour relations if employees knew about it. Employees who were involved in labour negotiations with the union, costing proposals, creating cost projections and/ or were privy to the company's best projection of the wage settlement for the upcoming year were excluded from the bargaining unit.

45. Ms. Rutetzki had access to some personnel information, like S.I.N. numbers, but all other material related to employee relations were intentionally and systematically kept from her, with the exception of the global payroll costs which she needed to calculate the employer health tax. However, she did not have any access to projections of costs or proposals for terms and conditions of employment and was told she should not discuss salary with any other employees. The personnel information to which she was privy, such as S.I.N. numbers, was neither integral to her job, nor occupied a significant portion of her time, and in any event can not reasonably be construed as labour relations material.

46. The employer also argued that because Mr. Draves remembered and relied on some of the things Ms. Rutetzki told him, she was making entries in what could be considered an oral personnel file. If she had been deciding what material was important enough to be kept and used in determining employee issues, perhaps this would be an indication that she had some duties that related to material confidential as to labour relations. But it is was not she, but Mr. Draves, who was making that determination, and there is no evidence that she had access to any information that Mr. Draves later chose to note down. Employer counsel argued on a number of occasions that Ms. Rutetzki had full access to confidential information because she provided information on employees to him. However, the evidence indicates the information flow was one-way. There is no indication that Mr. Draves gave confidential information to Ms. Rutetzki. For instance, he did not divulge medical information he had from an employee they discussed, and she had no access to the personnel file kept by Mrs. Wickens. That she knew that certain problems were occurring with cash shortages, for instance, does not amount to "full access to confidential information" as argued. It was part of her cash tracking function, functions shared with at least two other employees. That she may have been under an obligation to keep that information from other employees (a point on which there was no evidence) does not make her confidential as to labour relations.

47. The employer also argued that due to the successor rights provisions in Act, the sale of a business is a labour relations matter. Therefore, it is argued that Ms. Rutetzki's role in the changeover of dealers indicates she was employed in a confidential capacity as to labour relations. The evidence indicated that her role in the changeover was in providing information and doing bookkeeping and clerical functions. There was no evidence of any role as to labour relations. Mr. Draves provided the run-down on the employees to Mr. Bannerman himself. That this included information from Carolyn Rutetzki is not conclusive because of the same considerations that apply in regards to the "oral file" idea dealt with above.

48. Employer counsel argued that Ms. Rutetzki was the clearing house for the financial picture of the operation. She organized and put together each financial account which would make up the profit and loss statement. Mr. Draves indicated one could create a profit and loss statement from the information she handled. The fact that it was theoretically possible to create a profit and loss statement from the material that went through her hands is not sufficient to warrant exclusion from the Act, especially when the finished report was intentionally kept from her. If she already had the information for all practical purposes, it would not have made sense to keep the report from her. Further, there is no evidence that Ms. Rutetzki did know how to determine the employer's profit from the material at her disposal, a function which required the accountant's services.

49. Although Ms. Rutetzki sometimes met with Mr. Draves alone in his office, she was excluded from the regular management meetings. Employer counsel argued that she was excluded from managerial meetings because they dealt with sales, not the financial picture she was involved in. It is odd that if she was as integral to the financial planning of the store as argued, that she would have been excluded from meetings discussing sales. In fact, the evidence does not support the idea that she was involved in planning at all. Wage grids were dealt with at these meetings as well. Ms. Rutetzki was not involved in these discussions, and was only allowed to see the wage grid to see where she personally fit at her individual wage review session, and had no regular access to it.

50. Ms. Rutetzki did have extensive duties in the collating and summarizing of the financial aspect of the store. She also wrote cheques. She was sufficiently knowledgeable about the accounts to deal with the accountant's questions about the paperwork sent to him. The employer argues that access to financial information on a regular basis unquestionably creates a conflict of interest, in that the financial position of the employer, what he could afford, would be in Ms. Rutetzki's hands before it was in the employer's. As can be seen from the cases referred to above, distinctions are made about the kind of access and functions performed with financial information. Ms. Rutetzki's involvement with the financial side of the business is all of a historical nature; it deals with the past. There is no evidence that she is privy to any plans or projections or costing of projected wages or changes to the employee complement. She is not allowed to see the profit and loss statement. She is not allowed to see any payroll figures except the gross amount, to which she mechanically applies a formula to determine the employer health tax owing. It would appear that she is being kept from the very aspect of the financial picture that would impact on labour relations.

51. Ms. Rutetzki was allowed to take home the financial material she worked on when she was behind, and employer counsel suggested that she could pass this material on. We do not consider this material confidential as to labour relations, and the fact that it was otherwise confidential is not a reason for excluding her from the Act. Many bargaining unit employees across the province have access to information that they are not permitted to pass on, for commercial or privacy reasons, but this does not make them managerial.

52. It was further argued that, as Mr. Draves had described Ms. Rutetzki to Mr. Bannerman as his right hand person on the office side, as intimately familiar with the management and administration office side of the business, that she was clearly confidential as to labour relations. There is no doubt that Ms. Rutetzki was very familiar with the workings of the office to the extent required to do her duties. There is also no doubt that she would be more aware of the administrative side of the operation than many of the other employees. But this does not translate into being employed in a capacity confidential as to labour relations in light of the other evidence referred to above. The evidence is clear that Ms. Rutetzki was excluded from the information that would put her in a conflict of interest position. As indicated above, the fact that some of the information she dealt with is confidential from a financial or commercial point of view is an entirely different matter.

53. As the Board pointed out in the *Township of Innisfil*, cited above, being deemed to be an employee under the Act, and therefore able to engage in collective bargaining, does not diminish the trust and loyalty of employees in the performance of the work of the employer. The employee always owes duties to the employer, which include keeping confidential material that the employer has directed them should be confidential, or is obviously so, and being loyal to the employer in carrying out their duties. This does not mean they cannot engage in collective bargaining to further their own interests as well.

54. For all of the above reasons, the Board concluded that Ms. Rutetzki is an employee within the meaning of the Act.

55. Because of our finding that Ms. Rutetzki does not exercise managerial functions, and the considerable evidence that she was not acting on behalf of management in the organizing campaign, section 13 has no application to the facts of this case. We will deal with the role of perception of managerial status when we deal with the allegations concerning the membership evidence below.

The Membership Evidence

56. As to the evidence concerning allegations about the collection of membership evidence, we are of the view that there is not sufficient cause for concern for the Board to dismiss the application or order a representation vote. In other words, we found that the evidence did not indicate that the membership evidence was unreliable as an indicator that at the date of application, more than 55% of the employees in the bargaining unit had applied to become members of the Steelworkers.

57. The Board's jurisprudence has made clear that where misconduct is alleged, it will assess the evidence to ascertain whether it casts doubt on the reliability of the cards submitted. The central question is whether the conduct complained of would deter the reasonable employer from making his or her own decision as to whether she or he wishes union representation. The Board tries to be realistic about human behaviour and has considered such factors as whether the person involved is a paid organizer, or a fellow employee and whether the statements involved go beyond social pressure or salesmanship. Threats to job security are over the line. *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 and *Dupont of Canada Ltd.*, [1961] OLRB Rep. Jan. 360. The Board has also distinguished between misrepresentations which are not fundamental in that they do not relate to the effect or purpose of the membership evidence, and those that do: see *Masters Construction Ltd.*, [1988] OLRB Rep. Feb. 162.

58. In determining what is a threat to job security, the Board does not include statements to the effect that employees would have more job security with a union to fall into that category. The reality of the economic relationship between management and non-unionized employees is that there is a very real element of job insecurity. This is because, under the common law, which applies to discharges outside of the scheme of the *Labour Relations Act*, it is the law of unjust dismissal which applies; this does not involve the prospect of reinstatement no matter how unfairly discharged an employee is. The most that can normally be hoped for is damages for an unfair firing. Neither do the provisions of *The Employment Standards Act* provide the prospect of reinstatement in the face of an unjust discharge. Thus to suggest that a collective agreement provides job security which the employee does not otherwise have is a true and lawful thing to say. If people feel anxiety when their lack of such protection is drawn to their attention, or feel threatened or insecure when thinking about it, it does not mean, without more, that their job security has been threatened by the person speaking about the subject. And this is true even if the employer is actually very fair.

59. It is not a threat in the ordinary sense of the word, or under the *Labour Relations Act*, to point out the economic insecurity at the basis of the common law contract of employment. Nor is it a threat to suggest that without a collective agreement an employer is free to do what he likes in terms of cutting hours and benefits. Other than the right to quit, which in the current economy is a right many do not choose to exercise, the average employee has little effective recourse on such issues outside the scheme of collective bargaining. To say that employees can engage in individual

negotiations about such things with their employer is theoretically true, but the real individual bargaining power of hourly workers such as the ones at this store may well be negligible.

60. It is also of note that insecurity about jobs at a time of change is normal. For instance, Mr. Draves tried to reassure employees before he left because he knew such fears would arise.

61. It is important to note as well that a feeling of “intimidation” because of personality or tone of voice, or aggressive or unfriendly attitudes or personalities is not the same as a threat. See *Ken Bodnar Enterprises Inc.*, [1994] OLRB Rep June 688 (another Canadian Tire store) and *Venture Industries Canada, Ltd.* [1989] OLRB Rep. October 1074.

62. However, it is an entirely different matter to threaten that a person might lose their job or otherwise be negatively affected, in comparison to those who supported the union, if they did not sign. Such allegations were made in this case, and if they had been supported by the evidence, the result would have been different. However, there was not a shred of evidence to support them. Not one of the witnesses testified that anyone suggested that if they did not sign, and the union got in, that they would be worse off than those who did sign.

63. It is important to keep in mind that the Board is not concerned with a person’s motivation for organizing a union as it is their right to do so. Much of the evidence in this case was aimed at showing that the statements Ms. Rutetzki made to others about her reasons for wanting a union were inaccurate or over reactions. The Board allowed this evidence over the objection of the union, because the pleadings suggested that the statements made by Ms. Rutetzki were part of a scheme of fundamental misrepresentations systematically made to the employees. In the final analysis, the evidence in this area showed mostly that the employer feels both that Ms. Rutetzki was hasty in her judgement of them, and that she misinterpreted some of the things that happened in the initial period of their presence in the store. It did not show that she had no basis for the things she said. Rather, it showed there were a number of opinions about changes in the workplace, and that Ms. Rutetzki and others were concerned about the future.

64. The Board dismissed a number of allegations as disclosing no *prima facie* case at the outset of the hearing with brief oral reasons. They included the allegation that the union had not contacted everyone in the proposed bargaining unit. The union is not required to contact everyone; there is no requirement for full debate in the Act. The Board had this to say on the same subject in *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. March 158, affirmed by the Divisional Court in an unreported decision of May 31, 1993:

... Unions frequently organize through contact with some but not all of the employees of an employer. If it is to obtain certification without a representation vote (in the absence of contraventions of the Act making certification appropriate under section 9.2) a union will have to gain the support of over fifty-five per cent of the employees. However, it is under no obligation to contact all of the employees. A union may be unable to contact employees for whom it does not have an address or telephone number, or who are away on vacation or absent due to illness. Moreover, it may choose to intentionally avoid contacting employees who are known to be strongly opposed to unionization, or who are thought likely to notify the employer of any such contact. Employees who are not contacted by the union are treated by the Act (and the Board) as being opposed to unionization (by virtue of being included in the denominator but not in the numerator of the fraction used to determine the count). The same is true of employees contacted by the union who decline to sign a union card.

65. The allegations dismissed for want of a *prima facie* case also included a number of allegations that amounted to employees feeling rushed, and wishing they had not been urged to sign right away. However, there is evidence of at least one employee who simply said she would not sign without more time, and it is clear others could simply have said no as well.

66. As well, sentiments such as those expressed by a number of people that the Bannermans should be given a chance to prove themselves to the employees without a union are opinions which are essentially expressions of opposition to unionization, but suggest no impropriety in the campaign itself, and do not cause the Board to intervene.

67. There were other allegations filed in writing which were unsupported by any evidence; they are hereby dismissed.

68. The Board was referred by the employer to *Elk Lake Planing Mill Limited*, [1981] OLRB Rep. April 446 on the subject of the perception of employees that a person is managerial on the voluntariness of membership evidence. In that case, a displacement application, the person who collected much of the membership evidence was perceived by employees to have some duties beyond the rank and file employees. However, the Board found that he was not in fact managerial, and that his activities did not cast such a cloud on the membership evidence that the application should be dismissed. The Board ordered a vote, because of the unusual circumstances of that case, which included that all the members of the applicant had chosen to identify with management during a strike as well as the collector's ambiguous role.

69. The Board there analogized to cases involving petitions circulated by persons close to management and said that the question was whether other employees would likely have viewed the supervisor as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests. Where the person involved had his own, well-known, reasons for spear-heading a displacement organizing campaign, the Board found that there were not factors which would destroy the ability of the employees in the bargaining unit from electing on their own to join or not to join the applicant association.

70. Reference was also made to *Ontario Hydro* [1989] OLRB Rep. February 185, as well, at para. 94. Similarly, see *Addidas Textile (Canada) Ltd.*, [1980] OLRB Rep. May 639 at para 6. and 9. Where membership evidence was signed in the presence of a general manager and certain foreladies were signed as well, although section 13 (then section 12) was not applied, a representation vote was held as questions arose as to the voluntariness of evidence signed through the initiative of managerial personnel. See also *Waldorf-Astoria*, [1981] OLRB Rep. Sept. 1308.

71. These latter cases are distinguishable from the facts of our case, in that the individuals involved actually were managerial, and we have found that Ms. Rutetzki is not. In any event, we do not find that the evidence of perception of Ms. Rutetzki was such as to indicate that employees could not exercise their choice freely to join the union or not; we do not find the evidence supportive of the suggestion of undue influence.

72. We are not convinced that the employees involved signed as a result of a perception that Ms. Rutetzki was managerial and/or representing management. For instance, it is not disputed that she made it quite clear that she did not want the employer to know about the campaign in saying that she wanted the membership evidence to be filed quickly, before the Bannermans found out.

73. Mr. Abbass further argued that the pressure to sign union cards in circumstances like this where it is a "steelworkers town and the local president is there" should cause doubt as to the voluntariness of the evidence signed. There is nothing in the evidence or case law which would cause us to find that the mere presence of the president of the local at the mine in the same town cast doubt on the voluntariness of the membership evidence filed. The allegations about statements made by him and Ms. Rutetzki are dealt with below.

74. It is also important to keep in mind that not every misapprehension on the part of an employee who signs a union card is the result of a misrepresentation on the part of the collector. Something that the employee concludes but was not part of what the collector was saying is not to be held against the collector or the campaign. See also *Venture Industries Canada, Ltd.*, cited above.

75. The argument on behalf of the objecting employees stressed the opinion that the facts of this case were unusual, and suggested that the Board should find that the employees did not have the opportunity to check out the representations made to them. Specifically, the fact that all the signatures were obtained on one Sunday afternoon and evening is argued to mean that the cards are inherently unreliable, because no one had time to think about what they were doing. It was argued that the Board's usual assumption that employees could have or did check out the veracity of organizers' claims should not apply in this case. It is said that because of the length of the campaign, there was no opportunity to debate the merits of unionization. Counsel asserts that this may have been because the union did not want the dealer or the employees who were opposed to be able to talk to employees. Where employees are deprived of the chance to hear the other side, counsel suggested the Board should order a vote. He suggested that in particular in light of the amendments made by Bill 40, which remove the period up to the terminal date as a period for debate, the Board should consider ordering votes in cases like this.

76. Further, the objecting employees argue that because the Bannermans were new to the business in Kirkland Lake, the employees had had no opportunity to make an independent assessment of them and would have relied on what Ms. Rutetzki, the office employee, whom they reasonably perceived as management, told them was going on. When she said she had lost her position and might lose her job and that two employees had lost their job for no reason, she was believed. Counsel submitted that Ms. Rutetzki's reference to job security, reduction of hours and reduction of benefits might just be talk coming from the average employee, but when made by her in the presence of the well-known president of the mine local, they are sufficiently threatening that a vote should be held. Counsel asserts that the witnesses were deterred from refusing to sign by intimidation by Ms. Rutetzki.

77. We will deal with the specifics of these assertions below, but as a general proposition, we cannot accept them. Although it is true that this was a quick campaign, there are many campaigns that are no longer than one meeting. In small workplaces, campaigns sometimes last no longer than a coffee break. The Act does not require any specific length of time, or require that the matter be debated. Absent conduct in the nature of coercion, intimidation or threats, the Board relies on employees to just say "no" if they think they are not being given enough time or information to make the decision. It is not prepared to assume that something done quickly is not voluntary. Nor is it prepared to read into the 1993 amendments an intention that there be such requirements inferred by the Board. There is nothing in them which would suggest that that was the intention of the Legislature in passing them. If the Legislature had wished to change the direction of the Board's jurisprudence in this area, it could have, as it did explicitly in other areas in the 1993 amendments. Although Ms. Rutetzki has a strong personality and undoubtedly exerted some pressure on people to make up their minds quickly, there is no indication that anyone was deprived of the ability to simply say no. If the time pressure had been coupled with some negative consequence for not signing, it would be another matter, but the evidence does not warrant such a finding.

78. In coming to the conclusions about the membership 7 evidence, it was necessary to weigh the often conflicting evidence about what was said in the conversations that preceded and followed the signing of the membership evidence in issue. In the Board's experience, most wit-

nesses demonstrate that the human memory is subject to a variety of frailties which set in almost immediately after an event and increase with time. When that is combined with nervousness at giving evidence in a public forum, the dynamic between examiner and witness, as well as a host of other factors such as fatigue and personal point of view, even an honest witness will often give evidence that is not entirely reliable as to what actually happened. This is the most common source of conflicts in evidence, although some witnesses consciously lie. And the same witness may be mistaken or lie about some things and tell the truth about others. In the heat of cross-examination, it can appear that the world is divided between people who are lying and people who are telling the truth, and never the twain shall meet. In the final analysis, though, credibility is not mostly about villains and angels, or liars and people with total recall. Rather, most people are mostly trying to tell the truth as they know it (which means as they saw and remember it), but the various factors referred to above may result in testimony which sounds quite different from other people who testified about the same event or subject.

79. The witnesses in this hearing were no exception to this general state of affairs. There were contradictions and gaps between witnesses and within the evidence of most of the witnesses. The Board considers the accounts of the witnesses both on their own and as compared with other witnesses. Conflicts in the evidence which are necessary to resolve are resolved on the basis of a number of standard factors such as the demeanour of the witnesses, the extent to which their account accords with what is most probable in the circumstances, and the ability of witnesses to withstand the ever present pull of self-interest or the interest of the party with whom their position is most identified.

80. We will deal with each of the employees who gave evidence on the allegations about membership evidence.

Veronica Peters

81. The allegations in respect to Veronica Peters' card signing are that she signed on the basis of misrepresentations that i) all employees were being contacted, ii) what she was signing was not a union card. More specifically it is alleged that she did not intend to sign an application to join the union or accept membership in the union.

82. There are significant inconsistencies both within Ms. Peters evidence and between her and the union witnesses to the signing of her card, Ms. Rutetzki and Mr. Yee. The Board first considered the evidence given on its own merits, independent of the contradictions between it and the union witnesses, to assess if the allegations had been made out.

83. As to the first allegation, we are convinced from Ms. Peters' evidence that she formed an impression that all the employees in the store were being contacted, but she confirmed on cross-examination that that was not actually what was said to her. Thus, we do not find the evidence to support the first portion of her allegation. In any event, we do not find that a statement that all the employees were being contacted, even if untrue, would be so material as to call into question the nature of the membership evidence as an expression of the employee's wish at the time of signing. See *Can-Eng Metal Treating Ltd.*, and *Masters Construction Ltd.*, cited above.

84. The second allegation, that she was told that what she was signing was not a union card, is a much more fundamental matter. If the nature of what Ms. Peters was being asked to do was misrepresented to the extent that she was told she was not doing exactly what she was doing, i.e. signing a union card, this would be a material misrepresentation.

85. It is clear from Ms. Peters' testimony and the letter she wrote dated April 29, 1994,

(which she said was more reliable than her evidence, given the passage of time) that she was aware that the purpose of Ms. Rutetzki's visit to her house was to discuss bringing a union into the Canadian Tire store. She describes in her letter that Ms. Rutetzki and Mr. Yee were seated at her table and "continued to discuss how much better off we would be with the union". From this type of statement, it is fair to conclude that Ms. Peters knew that what was being discussed was unionization. Ms. Peters wrote that it was when she asked if all the people were being contacted that Ms. Rutetzki explained that "they needed 55% of the employees to agree to sign a card, allowing them to present their case before a panel in Toronto..." Ms. Peters then says she asked about the card again and got a similar answer, after which she says she asked if it was a union card and Ms. Rutetzki said "no" and explained again, about needing 55% of the signatures of employees in order to go before the Panel. She says she then asked if there would be any repercussion if she signed the card and did not go union, to which Mr. Yee answered no.

86. She said she signed the card with the understanding they were only presenting an informal request for the union. After saying that she was told that it was not a union card, she said there was no discussion about it being a union card, because the discussion was only allowing them to present their case. She says that she had no idea of what kind of case they were presenting and that although she knew that Ms. Rutetzki and Mr. Yee wanted the union in, she herself "was not even thinking union" when she signed the card. During cross-examination, Ms. Peters was asked the question: "They never said it was a proposal or an informal request", to which she replied, "In my heart it was". When the proposition that she had asked what the card was for, and Mr. Yee and Ms. Rutetzki had said to join a union, was put to her, she answered "I don't recall". And "They never said it was a union card."

87. The front of the card which Ms. Peters signed states: "Yes, I hereby apply for and accept membership in the United Steelworkers of America." At an angle over this, but not obscuring the words just set out are the two words, "STRICTLY CONFIDENTIAL". The Board is of the view, that it should be clear to anyone who reads the card that it is an application for membership in the United Steelworkers of America. Ms. Peters filled out the back of the card with information such as her name, address and phone number, and signed the front, but insists that she did not read the front of the card. There is no suggestion that she was hindered in any way from reading the card. From observing Ms. Peters in the stand, it is clear that she is an articulate, literate person. If we are to accept that she did not read the most important part of the card, perhaps it is appropriate to state the obvious: there may be consequences from signing things that one does not read.

88. Ms. Peters wishes to be relieved of the normal consequence of signing an application for membership because she says that she was told it was not a union card. Her evidence on this point is subject to the inconsistencies set out above, i.e. she says she had no idea what was going to be presented in Toronto although she was clear that what Ms. Rutetzki and Mr. Yee were doing in her house was trying to get a union into the store. She says she was clearly told it was not a union card, yet she says she cannot recall whether Ms. Rutetzki and Mr. Yee told her the card was to join a union. The evidence that "in her heart" it was just an informal request suggests that she concluded the request was informal in some way, and does not indicate a clear recollection that she was told that. That she was lending her name to something that she had no idea about, is not consistent with a reasonable approach by someone in Ms. Peters' situation. The surrounding evidence indicates that Ms. Peters is clearly able to speak up for herself, as she did to the Board and as the evidence disclosed she did when angry with Ms. Rutetzki. Having assessed this aspect of Ms. Peters' evidence on its own, in accord with what seems probable in the circumstances of the undisputed facts, the Board finds it unlikely that Ms. Peters did not understand what she was doing

when she signed the application for membership in the union presented to her by Ms. Rutetzki and Mr. Yee.

89. The Board has also assessed Ms. Peters' evidence in comparison to that of Ms. Rutetzki and Mr. Yee, who were present at the time of signing. There are discrepancies between Ms. Rutetzki and Mr. Yee as to whether he made certain statements about benefits. We have concluded that Ms. Rutetzki is not accurate on the point of whether Mr. Yee said that benefits would be the first thing to be cut, as both he and Ms. Peters agree that is what he said. Counsel for the employer and objecting employees suggested that I should reject all of Ms. Rutetzki's evidence because of this inconsistency and other factors including her caution on cross-examination, and all of Mr. Yee's evidence because of his failure to recall many details. Union counsel made similar suggestions about Ms. Peters. My assessment of the evidence is that no one's testimony was entirely accurate or free from the influence of various distorting factors, but that no one's evidence warranted being rejected outright. Thus, as I explained above, I have weighed the stories alone and in comparison to each other, and in light of what seems most probable in all the circumstances, including the undisputed facts.

90. Mr. Yee and Ms. Rutetzki were very clear that they had never said that what they were presenting was not a union card. Given Ms. Peters' confirmation that they had made it clear that they were trying to get a union in to the store, and that they were discussing the benefits of unionization, and that they explained that they needed 55% of the employees to sign to support a presentation before the Board, it seems much more probable than not that they did not say it was not a union card, as this would have been inconsistent with everything else Ms. Peters acknowledges they said, and inconsistent with the wording on the card. Ms. Peters said she was stunned by the idea that unionization was being considered, and that she did not recall the exact words that were said on the occasion in question. Although the Board does not expect witnesses to recall everything precisely, as most people do not, it is relevant to deciding whether Ms. Peters' testimony is an accurate reflection of what happened that her own evidence indicates she was bewildered at the time and that she was "trying to bring the words back" rather than actually remembering what was said. In sum, the Board has weighed the evidence in its totality and concluded that it is more likely than not that Ms. Rutetzki and Mr. Yee did not make the misrepresentation that what she was signing was not a union card. Thus, we do not find that they misconducted themselves on the occasion in question.

91. No threats or coercion were pleaded either by Ms. Peters or by counsel for the objecting employees in reference to her signing. However, Mr. Abbass later argued that Ms. Peters was intimidated because Mr. Yee said benefits were the first thing the employer would cut if they continued making cuts when she needed her benefits at that particular point in time. We do not find these statements to be more than salesmanship and thus they do not call into doubt the reliability of Ms. Peters' membership card.

92. The Board has also concluded that there was no perception on Ms. Peters' part that Ms. Rutetzki was acting on behalf of management or on inside information. When her own counsel asked her if she had thought about Ms. Rutetzki's knowing something about cutbacks she did not (referring to the idea that Ms. Rutetzki worked in the office) Ms. Peters answered that she had never thought about her knowing something. Further, the Board finds that Ms. Peters' actions in seeking Ms. Rutetzki out later in the week and yelling at her in the office about her views about the union are inconsistent with the idea that Ms. Peters considered her to be her superior or in some position of authority over her at work. As well, Ms. Peters' whole attitude in testimony about the organizing drive can be summed up in her statement, "The Bannermans don't deserve

this'', a remark totally inconsistent with any suggestion that she actually thought the organizing campaign was being conducted by or with any approval from management.

93. The thrust of Mr. Abbass's argument suggested that in any event one should order a vote because Ms. Peters did not intend to become a member of the union. Absent a material misrepresentation by the representatives of the union, or some indication that Ms. Peters was not in a position to decide to sign or not, the fact that she signed a clearly worded application for membership is important evidence that at the time she signed it, she intended to do so. We have concluded from the evidence that there was no material misrepresentation, and that Ms. Peters was able to decide not to sign if she wished. We have little doubt that Ms. Peters changed her mind later and now regrets having signed the card. Nonetheless, the evidence is persuasive that it is a sufficiently reliable indicator of Ms. Peters' wishes at the time she signed it.

Herb Zielkie

94. Mr. Zielkie testified that before he signed, Ms. Rutetzki told him that they already had 75% of employees signed but they wanted 80%. Ms. Rutetzki says that when she first talked to him on the phone, she said a majority of the people she had spoken to were for the union, and that a few days later, after he had signed, she called him to tell him nearly 80% had signed. Mr. Zielkie cannot recall being told that on the later conversation. In other testimony, Ms. Rutetzki said that she often told people that 55% were necessary for certification but the union wanted to get at least 60%.

95. Having considered the two accounts, we are of the view that neither is a material misrepresentation which goes to the root of the membership evidence. In any event, on the basis of the list the union organizers were working with at the time, it was true that approximately 75% of the employees in the bargaining unit had signed when Ms. Rutetzki was talking to Mr. Zielkie, although Ms. Rutetzki insisted she did not know this at the time that she spoke to Mr. Zielkie. We are persuaded by Mr. Zielkie's evidence that he knew what he was doing when he signed; he had been involved with a union before at the mine. He evaluated what Ms. Rutetzki said, for instance, about wage negotiations, based on that experience and what he knew about the garage where he worked. He said the percentages were not in any event what he relied on in signing.

96. Mr. Zielkie also said he wondered what management was doing bringing a union in, as he was under the impression that Ms. Rutetzki was part of management because she worked in the office. He appeared to base this on the fact that he dealt with her in regards to forms for benefits and reimbursement for boots. He raised no concerns about this to Ms. Rutetzki or anyone else at the time. The Board has found that Ms. Rutetzki does not actually exercise managerial functions. It is clear that Mr. Zielkie was not subject to Ms. Rutetzki's supervision and that he had never dealt with her in regards to wages or other truly managerial matters. Nor is there anything to suggest he thought she was acting on behalf of the Bannermans. We are not of the view that Mr. Zielkie's perception of Ms. Rutetzki's status, which really amounted to his knowledge that she was an office worker, was such as would deter him from exercising his right to choose whether or not to sign. He acknowledged that he agreed to have Ms. Rutetzki's husband come over to sign a card, although he felt somewhat pressured because he was tired and did not find it easy to say no to Ms. Rutetzki. These latter factors are in the realm of social pressure, which the Board has consistently said it will not police.

97. Counsel for the objecting employees argued that Mr. Zielkie signed on the basis of a material misrepresentation that the union was already in the store. Ms. Zielkie testified that Ms. Rutetzki said that a union was formed or being formed at the store, or that they were bringing a union in to the store. If Mr. Zielkie concluded from that that the union was already certified, and

he should “get on board”, the evidence does not warrant the conclusion that it was because Ms. Rutetzki said the union was already certified. The words he attributes to Ms. Rutetzki to the effect that a union was being formed, are not misrepresentative. In any event, the statements attributed to Ms. Rutetzki do not amount to material misrepresentations about the organizing campaign.

98. Having considered the totality of Mr. Zielkie’s account, we are of the view that he voluntarily signed the card, without any material misrepresentation or unlawful pressure.

Janet Hartling

99. It is alleged that Janet Hartling did not know what she was signing when she signed a union card in front of Ms. Rutetzki and Mr. Yee. Ms. Hartling was a straightforward witness, who said that she read the card, and understood she was applying to join a union, but that she thought there would be more steps before she became a member. She further said that she understood that the card was being used to try to get a union in at the store. On cross-examination, she agreed that Ms. Rutetzki had told her what the card was for, that signing it would be joining the union. As the Act considers an application for membership on the same footing as evidence of membership for the purposes of a certification application, we are of the view that Ms. Hartling had sufficient understanding of what she was signing when she signed even if one relies only on her direct examination.

100. There was conflicting evidence about an intervention from Ms. Hartling’s mother during the visit to her house. Ms. Hartling recalls that her mother said to Ms. Rutetzki that she (Ms. Hartling) did not know what she was doing, and that Ms. Rutetzki answered that it was confidential. Ms. Rutetzki’s version was that Ms. Hartling’s mother said to Janet that she better know what she was doing, and that she responded that the cards were confidential and the Bannermans would not know that Ms. Hartling had signed. On cross-examination, Ms. Hartling acknowledged that it was possible that Ms. Rutetzki’s recollection was correct. Ms. Rutetzki testified that Mrs. Hartling added, “You know that’s a union card; once you sign you can not just change your mind.”, and that Janet responded that she knew what she was doing. When this version was put to Ms. Hartling on cross-examination, she said that she doubts that she said that because she did not know what she was doing, but that she would not deny that she said that.

101. In the final analysis, we are not persuaded that much turns on which version is correct. Both versions indicate that Ms. Hartling’s mother interrupted in a way that was intended to make her think about what she was doing. It was an “out” which, had Ms. Hartling wished, she could have availed herself of.

102. At one point in her testimony Ms. Hartling said that Ms. Rutetzki had told her 80% signed during the card-signing visit and that this was a major reason she signed. Later she said she had said most had signed, and that she did not remember the exact words. Ms. Hartling said that it was not until the next day that she asked Ms. Rutetzki who she had approached, at which time Ms. Rutetzki said 80% had signed. We have the same view of this as with the similar issue in regards to Mr. Zielkie. It does not amount to a material misrepresentation even if it was said.

103. It is alleged that Ms. Hartling was intimidated when Ms. Rutetzki said that two workers were fired and that she did not feel it was for any specific reason, and that this caused her to be concerned that without a union her job was in jeopardy. Ms. Hartling’s testimony was that she understood Ms. Rutetzki’s concerns to mean she could be fired too and that if there were no reason for firings the union would be helpful.

104. Ms. Hartling testified that Ms. Rutetzki said salaries and benefits could be cut with the

new management, and that hours were already being cut. As she did not work many hours and did not have many to cut, this was of concern to her. She also felt she was not fully informed.

105. Ms. Hartling wrote in her letter to the Board that she was intimidated because she feared having Ms. Rutetzki mad at her at work. She had had an experience where Ms. Rutetzki gave her unsolicited advice about a personal matter, which she had not appreciated. However, she did not follow the advice.

106. On a number of occasions, Ms. Hartling's letter also states simply that she was persuaded to join the union, something that is the lawful object of organizing campaigns. She then relates that the reason that she knew Ms. Rutetzki had not gone about getting the union together properly was because she had not asked the people who the union would really affect. She was under the impression, as were many of the objecting employees, that the full-time employees were not given a say in the matter. As the union filed membership evidence on behalf of more than 55% of each group considered separately, this is incorrect and seems to be a misapprehension that arose at work during the week following the card signing.

107. We are not persuaded that there was anything untoward about what Ms. Hartling says occurred surrounding the signing of her card. The effect of her feelings about Ms. Rutetzki's personality are in the realm of social pressure, and, as we have said above, is not something the Board should police. Ms. Hartling related some of her discomfort with Ms. Rutetzki to the fact that she worked in the office and could report her for mistakes on cash. However, given the totality of her evidence, we are not of the view that Ms. Hartling was unduly influenced by this, or that a reasonable employee would have been deterred from exercising free choice because of her office duties. There was, in our view, no fundamental misrepresentation made to Ms. Hartling. The statements made about hours being cut, or the possibility of being fired with no protection without a union, do not constitute misrepresentations in our view. Whether or not Mr. Bannerman thought there was any change to the average hours of the employees to whom Ms. Rutetzki was referring, it is clear that they had experienced a reduction in hours in the weeks prior to the campaign; Mr. Bannerman himself acknowledged this.

108. Ms. Hartling's wish that she had been more thoroughly informed, or that she had spent more time thinking about the matter was a theme in many of the objecting employees' submissions to the Board. It was clearly their point of view that the Act should include an obligation for unions to provide certain kinds of information, the obligation to contact everyone in the workplace, and a cooling off period. However, the Act does not provide for these things, and it is not for the Board to insert them where the Legislature has not.

Rose Godin

109. It is alleged that Rose Godin was told by Ms. Rutetzki that the new owner wanted to cut wages, had cut hours and would probably find a way to cut benefits. She was told that the owners could cut her hours and even fire her and that she could not do anything about it if they did not have a union, and that she took this as a threat.

110. Her name is also listed as one of the people to whom representations were made that those who did not sign would not be protected from cuts to their wages, benefits, hours and the possibility of being fired.

111. Ms. Godin was a very forthright witness, and on the basis of her evidence alone, we are persuaded that she intended to sign the card when she did, but had second thoughts after doing so. Her own evidence supports a finding that she felt concerned about job security after hearing what

Ms. Rutetzki and Mr. Yee had to say, but that she was not intimidated, and had no misrepresentations made to her.

112. Counsel for the objecting employees argues that one has to view the interaction between Rose Godin and Carolyn Rutetzki as the interaction between a person who supervises and trains her and is abrupt and domineering, that she took what Ms. Rutetzki said as a threat to her job security, since it came from someone who knows what goes on and is close to management. Counsel said, "Rose sees Carolyn as the boss". There is nothing in the evidence that we find objectively intimidating, and in those circumstances, Ms. Godin's reactions are in the category of reactions to peer pressure. As to the argument that Ms. Rutetzki was perceived as the boss, this was not evident from Ms. Godin herself, and we have found that, objectively, Ms. Rutetzki was not the boss. We are of the view that there was nothing in the evidence of Ms. Godin that persuades us that Ms. Godin was, or any other reasonable employee would have been, deterred from expressing her own choice.

113. The evidence is clear that Ms. Rutetzki made reference to various ways in which employees were vulnerable, including the possibility of cuts to hours and benefits and competition from Walmart. Ms. Godin acknowledged that Ms. Rutetzki might have said that she heard about a proposed change to the way the Bannermans calculated labour costs from the floor manager rather than the Bannermans, although she was not sure which person Ms. Rutetzki said she had been talking to. We are not of the view that the source of these remarks changes the conclusions above about Ms. Godin's perception of Ms. Rutetzki.

114. After much consideration, I have decided that it would not be fruitful to deal in detail with the serious concerns the Board had about the conduct of this hearing. Suffice it to say that the adversary system appeared at its worst in this hearing. It is not my view that the excesses on which I commented orally at the hearing were in anyway necessary to the protection of the interests represented. Rather, they served to unnecessarily worsen the divisions engendered by the differences of opinion over union representation. I orally urged the parties to attempt to muster sufficient goodwill to overcome the negative effects of such a prolonged and aggravated hearing as this one became, and wish to reaffirm that here, as it is important to the long-term working relationships of all concerned.

119. For the reasons and as a result of the findings above, the Board certified the applicant on August 19, 1994.

**3006-94-M IWA Canada, Applicant v. Earnway Industries (Canada) Ltd.,
Responding Party**

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Board directing employer to provide work to its employees equivalent to number of hours provided when operating two full shifts until Board determining if lay-off of 23 employees legitimate

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *R. W. Pirrie* and *D. A. Patterson*.

APPEARANCES: *Sean Fitzpatrick*, *Mike Hunter* and *Dana Lockwood* for the applicant; *Michael Carter* for the responding party.

DECISION OF THE BOARD; November 28, 1994

1. This is an application pursuant to the provisions of section 92.1 of the *Labour Relations Act*. The union requests the reinstatement, pending determination of a related complaint of unfair labour practices, of 23 employees.

2. The union filed an Application for Certification on November 16, 1994. This application arises out of the layoffs of the 23 employees on November 18, 1994. The union alleges that these lay-offs were motivated by the employer's desire to undercut support for the union such that, if a vote was held, the employees would not vote in favour of the union, or, if the union was certified, it would be unable to recruit employees to serve on the negotiating committee. The union did not assert a violation of what is colloquially referred to as the freeze provisions of the Act. The employer disputes the union's allegation. The employer asserts that it was unaware of the filing of the Application for Certification on November 16, 1994 and that the lay-offs on November 18, 1994 were a genuine response to a seasonal shortage of work.

3. The Board convened a hearing at which it heard the representations of the parties based on the application, response and accompanying declarations filed by all parties. Based on our review and consideration of these representations and the materials before us, the Board makes the following determinations.

4. The Board is satisfied that the applicant has established an arguable case on the merits of the complaint. The facts as pleaded by the union and set out in the various declarations filed are sufficient to cause the Board to enquire into the complaint to determine if the layoffs were motivated by illegal considerations.

5. The Board finds, however, that the balance of harm, when considered from the perspective of reinstating all 23 employees as requested by the union, weighs in favour of the employer. The declarations and documentation filed on behalf of the employer in this matter indicate that the employer planned to reduce the work schedule from three shifts down to two commencing the week of November 21, 1994, due to a shortage of work. This plan is set out in minutes of a staff meeting held on November 16, 1994 which were posted in the workplace. The harm to the employer, if the Board was to order all 23 employees reinstated, would thus be the unrecoverable cost of carrying individuals on its payroll without having any work for them to perform. The employer in question is a small employer and asserts that the cost of paying employees without having any work for them to perform could force the company to close.

6. However, the employer offered no explanation, documentary or otherwise, to explain why, on November 18, 1994 it effectively reduced the workforce, by way of the lay-offs presently

in issue, to what appears to be one shift instead of two as was the plan on November 16, 1994. Absent any explanation whatsoever as to why, on November 16, 1994 the employer was of the view it would have enough work the following week for two full shifts and on November 18, 1994 it determined there was only enough work for one shift, the Board is not persuaded that it would cause the employer harm to provide its employees with work equivalent to the number of hours of work that would be worked if the employer was operating two full shifts. Where an employer asserts that it has laid employees off for genuine business reasons and would incur harm if required to reinstate them because of the absence of work for them to perform, such an assertion is unlikely to be persuasive unless supported by documentary evidence establishing such lack of work. These assertions alone or supported only by charts created for the hearing, without any reference to where the data set out thereon was acquired, is of little assistance to the Board.

7. Accordingly, the Board orders:

- (a) Earnway Industries (Canada) Inc. to immediately provide work to its employees equivalent to the number of hours of work which is provided when Earnway Industries (Canada) Inc. operates two full shifts.
- (b) Earnway Industries (Canada) Inc. to post the attached notice at the workplace so that it is likely to come to the attention of its employees.

8. This panel of the Board will remain seized in the event the parties are unable to agree on how to implement the Board's orders. The applicant is to advise the Registrar by 12:00 noon on November 29, 1994 as to whether a protocol for implementing the Board's order has been agreed to. If no such agreement has been reached the Board will convene a hearing by conference call to hear submissions from the parties on an amended Board order setting out such a protocol.

9. The union requested the Board to award compensation to the 23 employees for wages lost to date. In the Board's view, given that no determination has been made as to whether the employer has violated the Act, it is not appropriate to make such an award at this stage. The issue of compensation is left to the panel dealing with the merits of the underlying section 91 application.

10. In addition, the Registrar is hereby directed to expedite the hearing of the underlying unfair labour practice complaint, Board File No. 3005-94-U such that the hearing will commence on December 6, 1994, and continue day-to-day thereafter, excluding Fridays until completed.

Appendix 'A'

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

THE BOARD HAS ORDERED EARNWAY INDUSTRIES (CANADA) LTD. TO PROVIDE WORK TO ITS EMPLOYEES EQUIVALENT TO THE NUMBER OF HOURS WHICH IS PROVIDED WHEN EARNWAY INDUSTRIES (CANADA) INC. OPERATES TWO FULL SHIFTS UNTIL SUCH TIME AS THE BOARD DETERMINES IF THE LAY-OFF OF 23 EMPLOYEES ON NOVEMBER 18, 1994 WAS LEGITIMATE.

A HEARING BEFORE THE BOARD IS SCHEDULED TO BEGIN ON DECEMBER 6, 1994. THE PURPOSE OF THAT HEARING IS TO DETERMINE WHY THE LAY-OFFS OCCURRED.

IF THE BOARD IN THE END DECIDES THAT THE REASONS FOR THE LAY-OFFS HAD NOTHING TO DO WITH THE UNION, THEN THE TEMPORARY ORDER WILL BE REVOKED AND THE COMPANY WILL BE PERMITTED TO REVERT TO THE LAY-OFF SITUATION IMPLEMENTED ON NOVEMBER 18, 1994.

IF THE BOARD IN THE END DECIDES THAT THE LAY-OFFS OCCURRED BECAUSE THE EMPLOYEES SUPPORTED THE UNION, THE BOARD MAY CONFIRM THE TEMPORARY ORDERS OR ORDER THAT ALL 23 EMPLOYEES BE RETURNED TO WORK.

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH ARE PROTECTED BY LAW:

AN EMPLOYEE HAS THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER OWN CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

AN EMPLOYEE HAS THE RIGHT TO CAST A SECRET BALLOT IN FAVOUR OF, OR IN OPPOSITION TO A TRADE UNION IF THE ONTARIO LABOUR RELATIONS BOARD DIRECTS A REPRESENTATION VOTE.

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BY AN EMPLOYER OR A TRADE UNION OR A REPRESENTATIVE OF AN EMPLOYER OR A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT INCLUDING ATTENDING A HEARING AS A WITNESS OR A POTENTIAL WITNESS.

AN EMPLOYEE HAS THE RIGHT TO REMAIN NEUTRAL, TO REFUSE TO SIGN DOCUMENTS OPPOSING THE UNION OR TO REFUSE TO SIGN A UNION MEMBERSHIP CARD.

IF AN EMPLOYEE IS PENALIZED OR THREATENED OR FORCED TO DO ANYTHING, OR NOT TO DO ANYTHING, FOR EXERCISING ANY OF THESE RIGHTS, A COMPLAINT MAY BE FILED WITH THE ONTARIO LABOUR RELATIONS BOARD.

This is an official notice of the Board and must not be removed or defaced.

4141-93-R; 4275-93-U Euclid-Hitachi Employees Association, Applicant v. Euclid-Hitachi Heavy Equipment Ltd., Responding Party v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1917, Intervenor; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) and its Local 1917, Applicant v. Euclid-Hitachi Heavy Equipment Ltd., Responding Party

Certification - Employer Support - Trade Union - Trade Union Status - Unfair Labour Practice - Board declining to bar certification application by employees' association under section 105 of the Act following unsuccessful application to terminate union's bargaining rights - Employees' association found to be a trade union under the Act where applications for membership not completed until several weeks after other steps in forming union - Board not persuaded that employer participated in formation or administration of association - Board directing that ballots cast in pre-hearing representation vote be counted

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *John Hyde, Bill Elliott and Colin Vos* for Euclid-Hitachi Employees Association; *Norman MacL. Rogers, Bill Rowe and Michael Fitzgibbon* for Euclid-Hitachi Heavy Equipment Ltd.; *Frank Luce, Lisa Kelly, Tammy Heller and Gary Kentner* for CAW - Canada.

DECISION OF VICE-CHAIR RUSSELL G. GOODFELLOW AND BOARD MEMBER W. H. WIGHTMAN; November 30, 1994

1. These files are a displacement application for certification by the Euclid-Hitachi Employees' Association (the "association") and an application under section 91 of the *Labour Relations Act* by the incumbent CAW Local 1917 (the "CAW" or the "union").

2. A pre-hearing vote was held in the application for certification and the ballot box was sealed pending the resolution of the following issues:

- (i) whether the Board should refuse to entertain the application for certification, having regard to section 105(2)(i) of the Act and the recent dismissal by the Board of an application for termination of bargaining rights filed by the president of the association, William Elliott (the "bar" issue);
- (ii) whether the association is a "trade union" within the meaning of the Act (the "trade union" issue); and
- (iii) whether the association was formed with the participation and support of the employer, and whether the employer thereby interfered with the administration of the union and the representation of employees by the union contrary to sections 13 and 65 of the Act (the "employer support" issue).

3. Each issue will be dealt with in turn.

The “Bar” Issue

4. Section 105 of the Act states in part:

105.-(1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

• • •

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;

5. For purposes of this motion, we are asked to assume that the association is a “trade union” within the meaning of the Act.

6. The application for certification was filed by the association on March 4, 1994. The president of the association is William Elliott. On January 21, 1994, Mr. Elliott filed an application for termination of bargaining rights. That application was dismissed on February 25, 1994, after Mr. Elliott had asked to withdraw it. The reason for the request to withdraw and for the dismissal of the application was that Mr. Elliott had already been advised by the Labour Relations Officer assigned to the case that unless certain timely reaffirmations of support filed on behalf of the CAW could be shown to be involuntary, the application would be three signatures short of the forty-five per cent required for a vote under section 58(3) of the Act.

7. Mr. Elliott testified that the application for termination of bargaining rights and the application for certification were part of a single strategy to remove and replace the union. Counsel to Mr. Elliott in this application was also consulted by him with respect to the termination application.

8. At the time Mr. Elliott filed the termination application, the union and the employer had commenced bargaining for the renewal of a collective agreement. The agreement was to expire on March 6, 1994. In light of these applications, however, the parties agreed to suspend further negotiations and to continue the terms and conditions of employment set out in the expired collective agreement.

9. On the basis of these facts, the union submits that the Board should refuse to entertain the application for certification. It relies on the close association between the applicants in both cases, the fact that both applications were part of a single strategy, the disruptive effect that the applications have had on collective bargaining, and the lack of opportunity for the union to bargain a renewal agreement between the dismissal of the first application and the filing of the second.

10. As pointed out by the union, the questions the Board asks itself in a case of this kind were set out in *Cara Operations Limited*, [1992] OLRB Rep. Mar. 295, and may be re-stated as follows:

- (1) Has the representation issue been raised and determined in a previous Board proceeding?
- (2) If so, has the union had a reasonable opportunity to bargain since then?
- (3) Are there any exceptional circumstances?

11. This approach to the exercise of the Board's discretion is intended to ensure that employees are given a reasonable opportunity to express their views on the question of continued representation by the trade union, or representation by another trade union, without causing undue disruption in the workplace or to the collective bargaining process. The Board has declined to entertain a subsequent application where an earlier application has resulted in a representation vote or where an applicant has asked to withdraw the application to avoid defeat in a representation vote that has been directed but not yet held (see: *Repac Construction and Materials Limited*, [1978] OLRB Rep. Jan. 91, and *Randy A. Burke*, dated June 7, 1993, unreported) [reported at [1993] OLRB Rep. June 572]. Absent a determination of the representation issue on the merits, however, the Board has generally been unwilling to dismiss a second certification or termination application brought by the same or similar parties as an earlier one.

12. While acknowledging that no vote was held or directed in Mr. Elliott's termination application, the union argues that the Board should treat the petition and subsequent reaffirmations of support filed in that case as akin to a vote or, in other words, as a determination of the representation issue. A majority of this panel does not agree. Petitions and counter-petitions are not a substitute for a secret ballot vote. They are simply the means by which a representation issue may be raised. The statute contemplates that the resolution of that issue can only be by way of the ballot box. Moreover, the mere filing of an application for termination of bargaining rights, whether or not it is followed by a counter-petition, does not give rise to the same concerns for workplace or collective bargaining disruption as the holding of a vote.

13. Accordingly, and absent any suggestion by the union of "exceptional circumstances", the Board will not refuse to entertain the association's application.

The "Trade Union" Issue

14. The second issue is whether or not the association qualifies as a "trade union" within the meaning of the Act. The evidence relevant to this issue was given by Mr. Elliott, Colin Vos, and Wayne Patterson, all of whom are representatives of the association.

15. In late 1993, and anticipating the commencement of the "open period" which was to arise under the collective agreement on January 6, 1994, Mr. Elliott began researching the subject of forming an in-house union to replace the CAW. He spoke to an individual who had been involved in an earlier application for certification by an employee association at the predecessor to Euclid-Hitachi and obtained a copy of the Board's decision in that case (see: *VME Equipment of Canada Ltd.*, Board File No. 0879-86-R, dated October 14, 1986) [reported at [1986] OLRB Rep. Oct. 1480]. From that decision, Mr. Elliott understood that the earlier application had been dismissed because individuals had signed applications for membership in the association *before* the constitution was ratified, rather than after. Accordingly, as far as Mr. Elliott could tell, "the thing to do was to prepare a constitution, hold a meeting, read the constitution, vote on it, elect officers and then ratify the constitution by signing the back of it".

16. After speaking with representatives of other employee associations in the Guelph area, and at least one employer whose trade union had recently been decertified, Mr. Elliott obtained a copy of the employee association constitution at Schneider Canada. Over Christmas and into January 1994, Mr. Elliott had the 12-page Schneider constitution re-typed, leaving blank spaces for matters peculiar to Euclid-Hitachi. He then called a meeting for January 22, 1994 at the Orange Hall in Guelph.

17. The January 22nd meeting was one of a series of meetings that had been held over the preceding months to gather support for the formation of the in-house association and the concurrent application for termination of bargaining rights. The termination application had been filed the previous day, on January 21, 1994, and the meeting was attended by thirty-nine individuals who had signed the petition. Mr. Elliott began the meeting by delivering a speech reiterating the intention of forming the association to replace the CAW. Colin Vos then read the draft constitution aloud. During the course of this reading questions were asked and votes were held to deal with a variety of matters, including the name of the association, the location of its headquarters, and the approval, ratification and confirmation clause. There was also some discussion about a “contract time and date”, which may or may not have had to do with the provision relating to the association’s “fiscal year”. Lastly, a new clause was added to the end of the constitution dealing with the need to recognize the coincident interests of workers and management in “achieving industrial peace, prosperity and happiness”.

18. Once these matters were concluded, all those present voted to adopt the constitution. Messrs. Elliott, Vos and Patterson were then elected as officers of the association. Finally, all those in attendance came to the front of the room and signed a document which had been read aloud and placed beside the constitution on a table. The document states:

I the undersigned agree and accept our own Constitution read at the Orange Hall on Waterloo Ave. Guelph, Ont. to be our own Constitution for our own Association The Euclid Hitachi Employees Association.

19. No membership cards were signed at or before the meeting. Over the course of the next few weeks, however, all those who had attended the January 22nd meeting signed applications for membership in the association.

20. On the basis of this evidence, the union submits that the association has not fulfilled the requirements necessary to form a “trade union” under the Act. The union relies on the following procedure set out in *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472, as establishing the prerequisites for the formation of a trade union:

- (1) A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
- (2) the constitution should be placed before a meeting of employees for approval;
- (3) the employees attending such meeting should be admitted to membership;
- (4) the constitution should be adopted or ratified by the vote of said members;
- (5) officers should be elected pursuant to the constitution.

21. Referring to these steps, the union says that there is no evidence that there were any members in the association at the January 22nd meeting. (Having regard to certain representations made by counsel for the association during the course of the hearing, the document identified in paragraph 18 of this decision could not be relied on as evidence of membership.) The only evidence of membership, therefore, is that which was obtained two or three weeks later when, according to the union, employees signed membership cards in a non-existent union.

22. Although noting that the Board may be less inclined than it once was to take a “technical” view of the requirements of trade union status (see e.g. *Caterair Chateau Canada Limited* [1994] OLRB Rep. April 365), the union says that it should not become “nihilistic” about it. An

organization cannot exist without members. An intention to form a trade union is not sufficient without the required acts.

23. The union also asserts that the Board does not have sufficient evidence of a constitution. The document provided to the Board by Mr. Elliott was admitted to be nothing more than a photocopy of a re-typed version of the document which was read aloud at the January 22nd meeting. Even this claim is unreliable, according to the union, given Mr. Elliott's inability or unwillingness to satisfy an undertaking given at the hearing to produce the original constitution.

24. A majority of this panel does not share the union's discomfort about the absence of the original constitution. While only Mr. Elliott expressly identified the constitution, it was implicit in the testimony of the other witnesses that the 12-page document placed before the Board was, in substance, the same document that had been agreed to by employees at the January 22nd meeting. More importantly, we are of the view that the steps taken by Mr. Elliott and his supporters to form a "trade union" were sufficient for the purposes of the Act.

25. The salient portion of the definition of a "trade union" is set out in section 1 of the Act, as follows:

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers

26. In keeping with the statutory purpose of ensuring that employees can freely exercise the right to organize by choosing, joining and being represented by a trade union of their own choice, and the varying levels of sophistication of those who might seek to exercise this right, the term "trade union" is given a broad definition. The statute requires only that there be an "organization" of "employees" formed for certain purposes. It does not specify a procedure by which this is to be accomplished. Nevertheless, to provide some measure of guidance to the labour relations community, and to assist employees in exercising their statutory rights, the Board developed the procedure set out in *Local 199 U.A.W. Building Corporation*. In the view of the majority of this panel, however, that procedure was intended to be facilitative rather than restrictive; it was intended to assist employees in achieving the goal of self-organization, rather than to restrict them in the exercise of that right.

27. In this case, the union did not dispute that it was the intention of Mr. Elliott and those who attended the January 22nd meeting to form an organization of employees for the purpose of regulating relations between the Euclid-Hitachi work force and the company. Nor did it suggest that the 12-page constitution that was placed before the Board was inadequate in its statement of the purposes required by the statute or as to the relationship between the employees who agreed to be bound by it. (The constitution contains the usual purpose clause and addresses a variety of matters necessary to the running of the association). The union also did not argue that the specific procedures followed to elect officers at the January 22nd meeting or to transact any other business, including the ratification of the constitution, were inadequate. Lastly, the union did not take the position that the applications for membership signed by those who attended the January 22nd meeting were deficient, apart from the date on which they were completed.

28. As the Board has noted on numerous occasions, the five step procedure set out in *Local 199 U.A.W. Building Corporation* is not an exhaustive guide to the ways in which a "trade union" may be brought into existence. Over the years, the Board has found many other procedures to have been sufficient (see e.g. *Caterair, supra*, and *Ontario Hydro*, [1989] OLRB Rep. Feb. 185), and it has been cautioned not to go beyond the statutory definition in determining whether an

entity qualifies as a “trade union” within the meaning of the Act (see *C.S.A.O. National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al*, [1972] 2 O.R. 498 (C.A.)).

29. Thus, in *Ontario Hydro, supra*, after noting the status of a trade union as an unincorporated association of individuals bound together by contract, the Board stated:

... the only essential prerequisite to the existence of an unincorporated association of individuals is that two or more such individuals have agreed to be bound by the terms of an identifiable constitution. We were not referred to any judicial authority for the proposition that such an agreement will not be effective unless the parties to it have employed ratification votes, membership oaths or other formalities which are unnecessary to the formation of other contracts at common law. Nothing in the *Labour Relations Act* appears to authorize the Board's insisting on such formalities. The Board cannot go beyond the reasonable meaning of the provisions of the Act in imposing “requirements” in this regard.

30. In this case, it is clear that a group of employees attended the January 22nd meeting for the purpose of forming a “trade union”. Those employees then agreed to a constitution which includes as one of its purposes the regulation of relations between employees and employers. The employees then elected officers for the purpose of running the association. Later, the same employees signed applications for membership in the association. The fact that those applications were not completed until a few weeks after the other steps had been taken is not critical in our view. We are satisfied that the Euclid-Hitachi Employees Association is a “trade union” within the meaning of the Act.

The “Employer Support” Issue

31. The third issue is whether the employer participated in the formation or administration of the association, or contributed financial or other support to it, contrary to sections 13 and 65 of the *Labour Relations Act*. Those provisions state:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or other administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code or the Canadian Charter of Rights and Freedoms.

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

32. The purpose of sections 13 and 65 has been considered in a number of Board decisions. In *Edwards and Edwards Limited*, 52 CLLC para. 17,027, the Board stated:

The unfair practice sections of the Act (including section [65] which prohibits the type of employer conduct referred to in section [13]) are, in large part, designed to safeguard the freedom of employees to join and to bargain collectively through the trade union of their own choice which is granted in section 3. That purpose is furthered by the provisions of section [13] which places upon the Board the obligation to satisfy itself that no employer has meddled in the affairs of an applicant for certification. The section is clearly aimed at “company-dominated” trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the mat-

ter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned.

Subsequently, in *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806, the Board commented:

The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its sole allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union "qualified" to act on behalf of those it seeks to represent. Section [13] catches both the "sweetheart" arrangement between the parties directly affected and also the accepted support of any outside employer whose interests may be affected by the collective representation of those whom the union seeks to represent. In both instances the union's acceptance of employer support activates the Section [13] bar.

33. The evidence with respect to this issue consumed five hearing days, and is largely circumstantial in nature. Based on this evidence, counsel for the union urged us to infer that if the association is a "trade union" within the meaning of the Act, it is one to which section 13 applies and that the employer's conduct violates section 65. For the reasons set out below, this is something which the majority is not prepared to do.

34. It was clear from the testimony of Gary Kentner, the union's plant chair, that the activities of Mr. Elliott and his followers have been known to the CAW since at least October 1993. At that time, Mr. Elliott, a 17 year employee, began preparing and circulating leaflets comparing the dues charged by the CAW with those that might be charged by an in-house association, and criticizing the union's accomplishments. On October 27, Mr. Elliott held a meeting to determine if there was sufficient initial support for the de-certification of the CAW and the formation of an in-house association. Of the 174 members in the bargaining unit, 42 attended the meeting, including Mr. Kentner.

35. Thereafter, Mr. Elliott and his followers appear to have carried on an open and undisguised campaign for employee support by, for example, distributing leaflets, holding meetings, and selling tickets to a "boy's nite out". (In this connection, we note that all but one of the bargaining unit members are men. The only woman in the bargaining unit testified on behalf of the association, but did not attend the "stag"). All of these activities appear to have been well publicized, and there is no suggestion that the union was unaware of any of them. Indeed, it appears that Mr. Kentner attended a further association meeting, on December 5, 1994, in the company of another union official. Overall, the CAW seems to have kept a close watch on Mr. Elliott's activities, not only to meet the challenge they posed but to ensure that they were without managerial support.

36. The CAW relies on the fact that Mr. Rowe, the personnel manager, acknowledges having had in his possession an association leaflet at the very outset of Mr. Elliott's campaign. The union also refers to the fact that Mr. Elliott placed leaflets on cars in the company parking lot during lunch hour on November 21, 1994. There is no evidence to suggest, however, that the association leaflet was given to Mr. Rowe by an association supporter, or that he knew of any of Mr. Elliott's activities prior to being informed of them by Mr. Kentner and his colleagues. Moreover, when Mr. Kentner advised Mr. Rowe of the distribution of the leaflets in the parking lot, Mr. Rowe's immediate response was to track down Mr. Elliott and order that the leaflets be removed without delay. In the same conversation, Mr. Rowe advised Mr. Elliott that any further activity of this kind on company time or company property would not be tolerated. All of this followed the taking of legal advice by Mr. Rowe, and the holding of a meeting with supervisors in which Mr. Rowe advised them to break up any and all non-work related activity.

37. Indeed, if there is one theme which runs throughout this case, it is the responsiveness of Mr. Rowe to the concerns of Mr. Kentner and his colleagues about perceived association activities. For example, at the request of Mr. Kentner, Mr. Rowe instructed Mr. Elliott to discontinue using the name "VME Association" (until January 1994 the company was known as VME Equipment Co. of Canada Ltd.), so as to avoid giving employees the impression that the company was supporting the association. This again followed the taking of legal advice. Likewise, upon being advised by the union of association cards and petitions having been circulated on company property (none of which was substantiated either at the time or in evidence before us), Mr. Rowe reiterated his earlier advice to supervisors and, with the approval of counsel, posted a notice in the workplace which was intended to prohibit all association and CAW campaigning on company property. When this notice was later challenged by a CAW representative as improperly placing CAW and association activity on the same footing, Mr. Rowe again reviewed the matter with counsel and advised his supervisors to permit legitimate CAW activity on company property that did not interfere with production. (In this latter connection, it is interesting to note that the only other evidence of association-related leafletting having occurred on company time and company property involved the distribution of a CAW leaflet by Mr. Kentner, just prior to the posting of the notice).

38. In light of Mr. Rowe's admittedly prompt attention to the union's concerns, Mr. Kentner was asked by employer counsel during cross-examination what it was about Mr. Rowe's conduct that caused suspicion. In an exchange which, for the majority, captures the essence of the case, Mr. Kentner first replied that it was the fact that the alleged association activity continued. Mr. Kentner was then asked:

Q. "So your concern was that, *despite the best of efforts of the company*, some discussions continued among the employees?"

A. "Yes".

39. The union also relies on the fact that Mr. Elliott was granted permission to leave work early on one occasion and then used this opportunity to sign-up supporters for his de-certification application. However, it was the uncontradicted evidence of Mr. Elliott, which we accept, that he had the prior approval of his leadhand, a bargaining unit member, to leave work once all of his work had been completed. It also appears from the evidence that such absences are not at all uncommon. The fact that Mr. Elliott's leave of absence form was later signed by the production manager, Mike West, appears to have been a formality in the circumstances and does not suggest to us employer support. Likewise, there is no evidence to suggest that Mr. Elliott's absences on January 31 and February 1, 1994 were for other than legitimate health-related reasons. The fact that Mr. Elliott made telephone calls on behalf of the association on one of these days is not something which can be brought home to the employer.

40. While the Board has somewhat more difficulty with the use by Mr. Elliott of the personnel facilitator's telephone on February 8, 1994 to call the Board officer assigned to the termination application, on balance we find that neither it nor Mr. Rowe listening to Mr. Elliott expatiate upon the withdrawal of his de-certification application on February 25 are sufficient to constitute the kind of material support required by the Board's case law. In connection with the former incident, it was the uncontradicted evidence of Mr. Elliott, which we again accept, that he advised the personnel facilitator that he needed to make a personal call and that both he and others had used the telephone for such purposes in the past. With respect to the conversation with Mr. Rowe, we note that it was preceded by one with Mr. Kentner, ostensibly to the same effect, which lasted for approximately one-half hour.

41. The union also suggests that an accounting entry in the association's records showing \$5,000.00 from the sale of stag tickets is inherently implausible. We do not agree. It is clear from the evidence that Mr. Elliott has a substantial number of supporters, and that one employee, Gary Blyth, sold between 40-45 tickets. At ten dollars each, that alone amounts to as much as \$450.00. The fact that the CAW appears to have derived less revenue from similar functions in the past does not affect our conclusion. Moreover, had such contributions been made, we would be surprised to find them recorded, in any form, in the association's one-page book of accounts.

42. The Board also heard considerable evidence about a March 2nd "meeting" between a large number of union and association supporters which took place during a break in one of the company's two main buildings. The meeting was observed from a distance by Mr. Rowe and Mr. West on the instructions of the plant manager. Voices were raised and a rubber mallet was brandished by an association supporter in front a union supporter. However, no complaints appear to have been made about the incident and no discipline was imposed. There was also no evidence to suggest that management saw the CAW supporter tapping the rubber mallet rhythmically into his palm, but even had it done so it is unclear what inference we should draw from the incident. The meeting arose at the instigation of the union and concluded more or less peacefully at the end of the break. Further, the CAW supporter before whom the mallet was displayed gave evidence before the Board. Mr. Watson is a man of considerable size and apparent vigour who, in the words of Mr. Kentner, is not easily intimidated. By all accounts, including his own, Mr. Watson simply "let it go on for a couple of minutes" before brushing the mallet aside with his hand stating, "that'll be enough of that".

43. Finally, the union also relies upon an alleged increase in Mr. Elliott's activity level in the workplace coincident with the campaign and certain conversations he is alleged to have had with association supporters. To some extent, we have already dealt with this issue through our description of Mr. Rowe's responsiveness to the union's concerns. For the most part, it appears that whenever these matters were brought to Mr. Rowe's attention, they were investigated or otherwise dealt with (e.g. through meetings with supervisors or the posting of the notice). Even more importantly, however, we point out that, except for the parking lot incident, there is no evidence whatsoever of an association membership card, petition, leaflet or stag ticket having been circulated on company property. Nor is there any evidence of a single association-related conversation having been overheard. Given the size of the bargaining unit and the CAW's awareness of, and interest in, the association's campaign, this fact is remarkable and speaks volumes in support of Mr. Elliott's own evidence that he instructed his followers from the outset (based on his knowledge of the reasons for a failed petition in 1986) to campaign away from the workplace and to ensure that there was no employer involvement.

44. In the result, the Board rejects the union's allegations that the association is a trade union to which section 13 applies or that section 65 has been violated, and directs that the ballots cast in the pre-hearing representation vote be counted.

DECISION OF BOARD MEMBER C. McDONALD; November 30, 1994

1. I respectfully dissent from the decision of my colleagues for the following reasons.

The "Bar" Issue

2. In cases where a second application for certification/termination is made on the heels of a prior application involving the same parties, the test to be applied in determining whether to set a

bar is as follows: Where the first application was genuinely determined in the first case, the second should not be permitted for some time.

3. The rationale for this rule is that, once a termination issue has been dealt with on its merits, barring special circumstances, the incumbent union ought to have a reasonable opportunity to demonstrate its ability to bargain without undue impediment. Another union should not be permitted to continually make successive applications. Not only are subsequent attempts likely to be futile, the incumbent union should have some "breathing room" to establish a collective bargaining relationship with the employer. This manifestly cannot be accomplished where all of the incumbent's time and resources are taken-up defending one raid after another. (*Cara Operations Ltd.*, [1992] OLRB Rep. Mar. 295 at 297; *Seven-Up (Ont.) Ltd.*, [1971] OLRB Rep. Dec. 791; *Trinidad Leaseholds (Can.) Ltd.*, [1949] 1 CLLC 1355 (OLRB); *Dunville Supermkt. Ltd.*, [1980] OLRB Rep. Aug. 1193 at 1195; *Browning-Ferris Industries*, [1982] OLRB Rep. Sept. 1253 at 1257; *Storwall Intl. Inc.*, [1985] Nov. 1679 at 1681; *R.D.L Electric*, [1986] Aug. 1145 at 1148; *Ont. Hospital Association (Blue Cross)*, [1981] OLRB Rep. Apr. 468; *Beaverwood Fibre Company Ltd.*, [1994] OLRB No. 318, File Nos. 1947-93-R and 1948-93-R.

For example, in *Trinidad Leaseholds*, the Board ruled as follows:

... In respect of regulation 7(4), with which we are immediately concerned, it would not in our view, accord with the manifest purpose of that regulation to conclude that once the ten month period has passed any number of applications may then be made, without interval, by the same applicant. On the contrary, we are of the opinion that where there is a current and active collective bargaining relationship and where an application, properly made under regulation 7(4), is rejected on the ground that the applicant does not enjoy the requisite employee support, a second application by the same applicant should not be entertained by the Board until a reasonable opportunity has been given to the parties to the collective agreement to bargain collectively with a view to its renewal.

The question of representation which we are now asked to determine was tried by the Board as recently as July 27, 1949, at which time the Board found that the applicant did not have as members in good standing a majority of the employees concerned. The right of the employees affected to select a new bargaining agent has thus been fully recognized although, in actual fact, no new bargaining agent was designated. We must now take into account what is, as indicated by regulation 7(4), the equally important consideration of stability and continuity in collective bargaining. Our earlier decision, by implication, identified the intervenor as the authorized bargaining agent of the employees affected. Little purpose was served if the right of intervenor to continue to represent those employees was immediately thereafter again subject to question at the instance of the same applicant. The respondent and the intervenor have inevitably been hampered in their collective bargaining activities during the period when they would ordinarily have been directing every reasonable effort toward the negotiation of a renewal of the collective agreement. It is our view that before the Board undertakes a further consideration of the question of representation on an application by the present applicant the respondent and the intervenor must be permitted a reasonable period of time during which to carry on collective bargaining without hindrance.

Accordingly, we find that the application is not timely and it is therefore dismissed.

The above passage was quoted approvingly in *Ontario Hospital Association*.

4. In *Beaverwood*, the Board ruled as follows:

18. The Board, in a line of cases that includes *Trinidad Leaseholds*, *supra*; and *Ontario Hospital Association (Blue Cross)* *supra*, has held that, once a representation issue has been dealt with on its merits and in the absence of special circumstances, an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate, without undue impediment, its ability to bargain with the employer for a collective agreement on behalf of those employees which it contin-

ues to represent. The Board in *Ontario Hospital Association (Blue Cross) supra*, at paragraph 24 through 29 reviewed the factors underpinning its decision in that case:

The Board continued as follows:

21. We find that in all the circumstances of this case, the C.E.C. lacked a reasonable opportunity to bargain. To entertain this application would reward Local 192's Executive Board for its part in impeding the negotiations after their membership directed them to remain in the C.E.C. fold. Since, a the C.E.C. has not had a reasonable opportunity since the final disposition of the first application and the filing of the second application to bargain with Beaverwood, the Board in the exercise of its discretion under section 105 (2)(i) of the Act, is of the opinion that it should refuse to entertain the instant application.

5. Clearly, in the circumstances, the relative support of both the applicant and the incumbent have already been genuinely determined. The applicant Bill Elliott and his counsel filed a previous application for termination of bargaining rights on January 21, 1994. The incumbent union C.A.W. filed relevant and timely membership reaffirmations which were sufficient to cause the applicant to have less than the requisite forty-five percent. The applicant withdrew his application when it became clear that the incumbent union had enough support so that its bargaining rights could not be terminated.

6. The Board must go beyond the designation of the applicant in the style of cause in determining who are the true applicants in a termination application (*Dunville* at 1194; *St. Michael's Shops of Can. Ltd.*, [1979] OLRB Rep. Oct. 1023).

7. The cases establish that is not necessary to have had a vote to cause the Board to refuse to entertain a second application. For example, in *Ontario Hospital Association*, the Board ruled as follows:

22. ...However, the cases also make it clear that where there is an ongoing bargaining relationship an application need not result in an actual representation vote to cause the Board to refuse to entertain a second application under section 923(2)(i). For example, an application for certification dismissed because the applicant could not establish itself as a trade union within the meaning of the Act has provided a basis to the invocation of section 92(2)(i). See *Filey-Hall Paper Box Co. Ltd.*, supra. A similar result has followed where a certification application was dismissed at a hearing because of clearly insufficient membership evidence support.

8. In the instant case the termination and certification application were brought by the same applicant, supported by substantially the same group of employees and represented by the same counsel. In similar circumstances the Board has dismissed the second application where it concluded it was brought to try the same representation dispute. See *Blue Cross, supra*:

21. For example, in *Filey Hall Paper Box Co. Limited, supra*, the initial application was one for certification and the second was that for a declaration terminating bargaining rights. The Board concluded that the principle explained in *Trinidad Leaseholds* applied particularly where substantially the same group of employees supported both applications and where the person authorized to represent the employees before the Board was the same person authorized to represent them in the earlier proceeding. The Board concluded that in all the circumstances the second application was brought "to try the same representation dispute" that was previously before the Board and dismissed.

• • •

25. A second factor in favour of a refusal, is the close association between the earlier termination application and the instant certification application. A substantial majority of the employees supporting the applicant were petitioners. Key officials of the applicant were prominent petitioners. The solicitor for the applicant acted for the petitioners in writing to the respondent

in early to mid-January on the topic of contract ratification procedures. He acted for them on their application for reconsideration. And this application was filed before the reconsideration request had even been dealt with by the Board. The close association between applications is also revealed in the literature of the applicant, excerpts of which are reproduced above. The totality of this issue raises the concern expressed by the Board in *Filey-Hall Paper Box Co. Limited*, *supra*, that this second application has been brought “to try the same representation dispute” that was previously before the Board and dismissed.

9. For all the foregoing reasons I would have dismissed the instant application.

The “Trade Union” Issue

10. The majority’s decision on this issue departs from the long established test that the Board applies in determining whether an organization qualifies as a “trade union”, within the meaning of the Act. In addition, because the Euclid-Hitachi Employees Association was formed in order to frustrate collective bargaining, it does not qualify as a trade union.

11. The Board has tried not to be unduly technical in determining whether its five criteria have been met. This is especially true where union organizers act without the benefit of knowledgeable advice. (*V.M.E. Equipment of Canada Ltd.*, [1986] OLRB Rep. 1480; *Butterfield Div., Litton Canada Ltd.*, [1985] OLRB Rep. July 1001; *Caterer Chateau Canada Ltd.*, [1994] OLRB Rep. Apr. 365; *Ontario Hydro*, [1989] OLRB Rep. Feb. 185; *S.E.I.U., v. S.E.I.U.*, [1991] OLRB Rep. Feb. 267 at 269; *Canteen of Canada Ltd.*, [1978] OLRB Rep. Sept. 802 at 806). That said, however, this flexibility must be balanced against the importance of the five steps. Because a union is a contractual relationship among employees, its existence requires a contract, referred to as a constitution. The constitutional requirement is not borne out of devotion to mere technicality, but out of the Board’s fundamental concern that the organization is a viable one, capable of representing the membership in collective action against their employer. In the absence of a constitution, there is nothing to demonstrate to the Board (or, more importantly, to the employees) what it is that the employees are joining.

12. Similarly, the steps must be taken in their proper order. Otherwise we would be left with a situation where, for example, workers could be members of an organization before it actually existed. As mentioned, a union is a contractual relationship among employees, which cannot exist until the contract defining it is ratified by its members. Thus, in *Canteen of Canada Ltd.* (*supra*, at p. 805) and *Federation of Teachers in Hebrew Schools* (*supra*, at p. 801), where the membership applications were made before the constitution was adopted, it was held that, at the time the cards were signed, the employees had not agreed to become contractually bound.

13. There are many other cases which discuss the importance of the steps being taken in the order described. See, for example: *Drummond Transit Company (Toronto)*, [1959] OLRB Rep. Feb. 31; *Brockville Chemicals Employees Association*, [1961] OLRB Rep. Jul. 134 at 134; *Kitchener Packers Co. Employees’ Association*, [1963] OLRB Rep. Apr. 20; *Proctor-Lewyt Div. of S.C.M. (Canada) Ltd.*, [1969] OLRB Rep. Sept. 760; *Northern Electric Co.*, [1974] OLRB Rep. Oct. 693.

14. In light of the circumstances of this case and the Board’s well-established approach to determining whether an organization qualifies as a trade union under the Act, I would have held that the Euclid-Hitachi Employees Association does not qualify as a trade union. In addition, I would have found that it did not qualify because it was formed in order to frustrate collective bargaining. The Association’s President testified that he organized the application for termination of the incumbent union’s bargaining rights and his certification application as part of a single strategy to get rid of the union. In both applications, the President was represented by the same counsel.

which Mr. Elliott referred to as a corporate lawyer. Mr. Elliott also benefited from the advice of other “employee associations” and employers. One of the employers he spoke to was the owner of Chapman’s Ice Cream Ltd., who gave him advice on how to decertify a union. Mr. Elliott testified that Mr. Chapman boasted of spending approximately a million dollars over four years in trying to decertify the U.F.C.W. Based on these facts, the association is involved in a conflict of interest in the sense that it does not owe its first allegiance to the welfare of the workers it represents. The following quotation from *Seafarers’ Training Institute*, [1984] OLRB Rep. Mar. 518, another section 1(1) case, is apposite:

6. Collective bargaining, by its very nature, requires an arm’s-length relationship between the “two sides” whose interests and objectives are sometimes divergent. To put the matter colloquially: the bargaining table really must have two sides and the employees’ representative cannot wear two hats. The union’s first interest and loyalty must be to those it represents and while this does not mean that there cannot be harmonious employer-employee relationships within a collective bargaining framework, neither should there be any doubt about the employees’ right to an independent spokes[person]. Proper representation demands that the union be unfettered by any conflict of interest. No group of employees should be left to wonder whether an unpopular stand was the product of a behind-the-scenes deal or a “cosy relationship” between those who run the union and those who run the employer.

15. Thus, as Adams pointed out in *Canadian Labour Law*, 2d ed. (Aurora: Canada Law Book 1993), see also *Butterfield* and *Centre Tool*:

“When associations of this nature have intervened in proceedings where an established union seeks certification, Boards strictly ensure that the association meets the formal requirements.”

16. This interpretation of section 1(1) is supported by the well established principle that remedial legislation, such as the *Labour Relations Act*, is to be given a large and liberal interpretation so as to ensure the attainment of the statute’s objectives. One purpose of the Act is to enhance the ability of employees to collectively negotiate past terms and conditions of employment (s.2.1). A purposive approach also requires a consideration of the provisions of the statute as a whole and not just the particular language of section 1(1). In this regard, reference should be had to sections 13 and 65 of the Act. Section 13 prevents an organization from being certified if an employer has participated or contributed in its formation or administration. Section 65 makes this an unfair labour practice.

17. The relevance of these sections to a section 1(1) case was discussed in *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889:

22. The scheme of collective bargaining set out in the Act is premised on a separation of identity and an arm’s length relationship between trade unions and the employees they represent on the one hand and employers, i.e. persons exercising managerial functions, on the other. Without this separation a conflict of interest may result and the interests of the employees who seek representation by a union in the regulation of their relationship with their employer may be compromised. The Legislature’s intention to [ensure] a separation between the two groups is apparent in numerous sections of the Act: Section (13) prohibits the Board from certifying a union if an employer has participated in its formation or administration or has contributed financial or other support; section (49) states that an agreement shall be deemed not to be a collective agreement if an employer has supported or participated in the union in the manner set out above; section (65) makes it an unfair labour practice for an employer to participate in or interfere with the formation, selection or administration of a trade union... . As well, the Board’s jurisprudence on statements of desire filed either in support of a termination application or in opposition to an application for certification requires that they be free from employer involvement... .

(See also *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509.)

18. For all the foregoing reasons, I would have held that the Euclid-Hitachi Employees Association does not qualify as a “trade union” within the meaning of the Act.

The “Employer Support” Issue

19. I would have found that the evidence supports the inference that the Euclid-Hitachi Employees Association was formed with the assistance of this and, perhaps, other employers.

20. In particular, I would draw attention again to the conversation Mr. Elliott had with David Chapman, the \$5,000.00 purportedly raised through the sale of “stag” tickets, the employer’s failure to call Mr. West as a witness to explain the approval of Mr. Elliott’s leave of absence, and the employer’s failure to call Mr. Ferraro to explain the use of the telephone. As counsel for the union pointed out, Mr. Elliott appears to have enjoyed a “high degree of comfort” from this employer for his activities. I would have found that the employer was, at minimum, wilfully blind to Mr. Elliott’s activities.

21. Based on these and the other facts referred to in the majority decision, I believe that the association is unfit to represent the employees of Euclid-Hitachi. I would, therefore, have directed that the ballots cast in the representation vote *not* be counted and that they be destroyed.

0158-94-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Applicant v. Famous Players Inc., Responding Party

Bargaining Unit - Combination of Bargaining Units - Union applying to combine newly certified movie theatre “front-of-the-house” bargaining units in Toronto and Ottawa - Board not accepting employer’s argument that combination would not reduce fragmentation of bargaining units - Board directing that the bargaining units be combined

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

DECISION OF PAMELA CHAPMAN, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO;
November 23, 1994

1. This is an application for a combination of bargaining units pursuant to section 7 of the *Labour Relations Act*.

2. By certificates dated February 10, 1994, the applicant (“the union”) was certified to represent employees in the following bargaining units:

all employees at the Eglinton Theatre in the City of Toronto, save and except the Relief Manager and persons above the rank of Relief Manager and;

all employees at the Gloucester 5 Cinemas in the City of Ottawa, save and except Relief Managers and persons above the rank of Relief Manager.

3. By letter dated February 16, 1994, the union gave notice to bargain to the responding

party ("the employer") and suggested that negotiations encompass both units with a view to concluding a single collective agreement.

4. By letter dated February 21, 1994, the employer responded that it intended to bargain for each of the units separately.

5. On April 14, 1994, the union brought the instant application seeking a combination of the two bargaining units, which is opposed by the employer.

6. The facts respecting the two units and the operations of the employer are not in dispute. Famous Players Inc. operates movie theatres across Canada, including those where the two bargaining units have been certified. Each of the units of employees is made up of what is called "front-of-house" staff: ushers, ticket takers and concession sales staff, including both full and part-time employees. The employees at the two theatres perform essentially the same duties under essentially the same terms and conditions of employment. Each theatre has a manager.

7. The Eglinton Theatre is a single screen theatre, employing approximately 10 employees in the bargaining unit. The Gloucester 5 Cinemas in Ottawa, on the other hand, is a five screen theatre complex employing 27 persons in the bargaining unit. These different configurations result in certain variations in the hours of work at the two theatres, arising from the fact that the nature of the single movie showing at the Eglinton location will influence the times during which the theatre is open. Thus, a family film will result in daytime and early evening hours in contrast to a more adult film, which may only require two evening showings. At the Gloucester cinema complex, the hours are fairly fixed due to the range of films being shown: in the summer, the theatre operates all day long, while for the remainder of the year, excepting the Christmas season, it is open only in the evening.

8. There is marginally more movement by employees among the different jobs at the Gloucester theatre, where employees may perform concession, usher and ticket taker functions within a matter of days. There is less movement among the employees at the Eglinton theatre.

9. While employees from one theatre may work shifts at other theatres in the same geographic area where required, such interchange does not occur between the units which are the subject of this application, given the distance between them.

10. The employer is divided for administrative purposes into several regions, each the responsibility of a Director or Executive Director. The Gloucester 5 cinemas fall into the Eastern Region, under the direction of an Executive Director based in the regional office in Montreal. This region includes theatres in Ontario east of Kingston, in Quebec and in the Maritimes.

11. The Eglinton Theatre falls into the Ontario Region, which includes Kingston and theatres west of that city, including Sudbury and Timmins, but not Thunder Bay. Thunder Bay falls into the Western Region.

12. The Executive Director or Director of each region has overall responsibility for all facets of the operations of the theatres in his or her region, including employment relations. The theatre managers, however, are directly responsible for the management of employees, including hiring and firing.

13. Because of this regional structure, the employer struck two separate bargaining committees to bargain collective agreements for the two units. The committee for the Gloucester theatre is made up of the Executive Director for the Eastern Region, the Ottawa District Manager, the thea-

tre manager, and the Executive Director for Industrial Relations. The Eglinton committee comprises the Director of the Ontario Region, the employer's General Counsel, and the Executive Director for Industrial Relations. The individual holding the latter position, who sits on both committees, has overall responsibility for labour relations for the employer, and is based at the head office of the employer in Toronto.

14. Finally, it was agreed that locals of the applicant union are certified to represent projectionists in the employ of the employer, who are the only other employees of the company represented by a trade union. These bargaining units are generally organized as separate units for each municipality, but they are also considered to have quasi-craft status, and there are certain historical anomalies, such as the inclusion of projectionists in Kingston and Belleville in the Toronto local as a result of a merger between the locals and an unopposed successorship application to the Board. The projectionist units are each represented by a separate local union, while the international union is the bargaining agent for each of the units in the present case.

15. Section 7 of the Act provides as follows:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or

- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

16. The Board has had occasion recently to consider appropriate bargaining unit configuration for front-of-house staff, resulting in at least two reported decisions in applications for certification in this industry (*Cineplex Odeon Corporation*, [1994] OLRB Rep. Jan. 25; *Cineplex Odeon Corporation*, [1994] OLRB Rep. Jan. 30). These decisions reflect the Board's conclusion that both single theatre and municipal units are appropriate for collective bargaining purposes.

17. In an even more recent decision, however, the Board considered an application by the same union for a combination of five single-theatre units and one municipal unit comprising two theatres into a single unit, including theatres in Brampton, Mississauga, Toronto, Scarborough, Guelph and Sudbury. In *Cineplex Odeon Corporation*, [1994] OLRB Rep. July 824, after an extensive review of the jurisprudence of the Board in combination cases, the Board stated as follows:

17. Having regard to the criteria set out in section 7 and the Board's jurisprudence, we conclude that combining these units would reduce fragmentation and facilitate viable and stable collective bargaining without causing serious labour relations problems. As a result, we direct that the seven bargaining units before us be combined. We remain seized with regard to any further remedial relief.

18. The union in this case relies upon the Board's decision in *Cineplex Odeon Corporation*, *supra*, and also upon other decisions in combination applications including *The Hudson's Bay Company*, [1993] OLRB Rep. Oct. 1042, and *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523. Counsel for the union points out that the facts in this case are virtually indistinguishable from those in *Cineplex Odeon*, and that as such we should take guidance from the Board's conclusions in that case. Indeed, this matter was adjourned for several months upon agreement of the parties, while the decision in *Cineplex Odeon* was pending.

19. Counsel for the employer, on the other hand, submits that the present application is clearly distinguishable from the *Cineplex Odeon* decision, and also from the *Hudson's Bay* case. This assertion is based upon that fact that in each of these cases the employer conceded one of the key factors in section 7, the fact that combination would reduce fragmentation. Indeed, it would appear from a review of each of those decisions that fragmentation was admitted and that no serious argument was made that combination would not reduce fragmentation. Rather, argument focused on whether combination would enhance viable and stable collective bargaining, which was to a large extent conceded as following automatically from a reduction of fragmentation, and more importantly, on whether or not combination would result in serious labour relations problems.

20. In the present case, the employer took the position that no fragmentation exists with the present bargaining structure, and that fragmentation would thus not be reduced by combination. In addition, and as a result, the employer submitted that combination would not enhance viable and stable collective bargaining, but would to the contrary impede bargaining and cause serious labour relations problems.

21. The employer's argument around fragmentation had two components. First, counsel for the employer submitted that the notion of fragmentation contemplated the splitting apart or "fragmenting" of some larger complete whole. That seems self evident, but counsel appeared to be tak-

ing it one step further, suggesting that the corollary of this proposition is that fragmentation is not reduced unless the larger whole is restored. In this case, he suggested, there is no larger appropriate whole which could be made up of these two units, geographically and organizationally disparate as they are. The case would be quite different, he submitted, if the union was seeking to combine all of the branches of the employer within a municipality, or an otherwise appropriate “whole”.

22. In advancing this submission, counsel for the employer appeared to be importing the notion of appropriateness as it has been considered in certification cases into the adjudication of an application for combination. There is no doubt some overlap in the factors to be considered in certification and combination cases, as has been noted in previous decisions of the Board. All of the factors set out in section 7, fragmentation, viable and stable collective bargaining, and serious labour relations, have featured in the Board’s deliberations on appropriateness in certification applications. At the same time, however, the Board has noted that “certification and combination applications are quite distinct types of actions and that the tests the Board applies, while overlapping, are indeed different” (*Cineplex Odeon Corporation, supra*, at paragraph 8). It cannot be ignored that the legislature did not include, when listing the factors which must be considered in determining whether or not combination should be ordered, the question of whether or not the proposed new unit was “appropriate”.

23. It is also important to note that the Act refers to the “reduction” of fragmentation, rather than its “elimination”. Thus, if, by way of example, we define a completely unfragmented whole as the entire operations of the employer, there remains the possibility of combining some fragments of that whole, thus reducing fragmentation, without combining all of the fragments and eliminating it entirely. This is likely to occur in situations where the entire operation has not been organized, and will inevitably occur, given subsection (1) of section 7, where different fragments are represented by different trade unions. In our view, this is exactly what is presented by the application before us, and we are satisfied that we can still speak of reducing fragmentation despite the fact that the combined unit proposed does not encompass an obviously coherent “whole”, but rather appears to be a larger “fragment”.

24. Despite the assertion of counsel for the employer that such a finding would be a radical departure from the Board’s established approach to bargaining unit configuration, we find support for this proposition in a much earlier decision of the Board on a certification application, *National Trust*, [1986] OLRB Rep. Feb. 250. In that case, the Board certified a unit consisting of 7 out of 37 branches of National Trust across Metropolitan Toronto. Six of these branches fell into the employer’s eastern region, and one in the western region. Each branch had a manager with the power to hire and fire, although regional and head office management retained the right to approve a wide range of labour relations decisions. Employees at the various branches had common terms and conditions of employment, and performed similar duties in the same classifications requiring the same skills and training.

25. In responding to the applicant’s proposed bargaining unit, the employer took the position that the Board should either certify single branches or all of the branches in Metropolitan Toronto. As set out at paragraph 10 of the decision, the employer’s concerns included the fact that the branches cut across regional administrative divisions, the geographical disparity of the branches, and in general, the efficacy of the Board grouping branches into a bargaining unit on the basis of where the applicant had succeeded in organizing, which in this case would produce, in the view of the employer, a “random and irrational” configuration.

26. In deciding *National Trust*, the Board reviewed this Board’s jurisprudence relating to

appropriate bargaining units, and also the approach of the British Columbia Labour Board to similar cases. At paragraphs 20 through 24, a number of B.C. decisions are cited, including *Woodward Stores*, [1975] 1 Can. LRBR 114, *The Original Dutch Pannekoek House*, [1979] 1 Can. LRBR 212, and an unreported decision *Thompson Valley Savings Credit Union* (B.C. Labour Board, file 414/81, September 2, 1981). These cases demonstrate that the approach of the B.C. Board has been to certify less than the full complement of branch outlets of an employer if that is what the union has been able to organize, with the proviso, known as the “Amon” principle, that “if and when the Union organizes the employees of the other locations the Board will enlarge this existing bargaining unit to include them” (see *Amon Investments Ltd.*, B.C. Labour Board, July 20, 1978). In adopting this approach, the B.C. Board has acknowledged that its role is not to certify only the *most* appropriate unit, but rather *an* appropriate unit, noting that to require a union to organize all of an employer’s branches would in many cases thwart organizing and prevent employees from accessing collective bargaining at all.

27. Noting that this same principle is applied by this Board, the panel in *National Trust* went on to consider whether or not the seven branches proposed had, in the words from *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, “a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer”. After enumerating a number of the factors often considered in relation to this test, the Board went on to state as follows:

28. All of these factors could, of course, be used to support the appropriateness, if disputed, of the broadest unit of branch-offices possible within Metro, being one comprised of all 37 of the branches therein. But once again the “most comprehensive” form of bargaining unit would begin to compete with the notion of allowing collective bargaining to begin at all. From our earlier review of the jurisprudence we have noted how Labour Boards in this and other jurisdictions have, in deference to that consideration, found it appropriate to impose upon an employer the burden of *individual* branch or outlet bargaining units, with all of the risks attendant upon such a proliferation of separate bargaining units: fragmentation of the employer’s enterprise, duplication of bargaining, additional exposure to strike and picketing activity, and the potential for “leap-frogging” should different units fall to be organized by *different* trade unions. From that point of view, the issuance of bargaining certificates for *individual* branches or outlets would appear to present a “worst case” scenario for the employer, with *any* consolidation of branches into one bargaining unit tending to minimize the number of bargaining units which the employer may ultimately be required to deal with.

29. This is true, we note, whether or not a particular Labour Board has the power to subsequently amend or consolidate existing certificates. The British Columbia Labour Relations Board, as noted, has that power. The Ontario Labour Relations Board has effectively said that it does not (see *City of Toronto Non-profit Housing Corporation*, [1982] OLRB Rep. Feb. 280). But nothing in the present case turns on that. The “Amon principle” of the B.C. Board was not a response to employer concerns over the certifying of 3 out of 5 retail outlets; it was a response to employer concern over certifying *anything* less than all of the employer’s outlets in a given municipality, and in particular over the practice of issuing certificates for individual locations. Indeed, the *Amon* case itself involved the issuance of a certificate for a *single* location in the municipality. What the “Amon” principle represented in other words, was recognition that the *individual-branch* approach to certification was a departure from standard notions of what would constitute for everyone a more viable form of bargaining structure, and an attempt to move back toward more comprehensive, broader-based collective bargaining. Whether, as with the B.C. Board, the result might eventually be a municipality-wide bargaining unit, or whether, as under the present Ontario case law, the Labour Board is restricted to whatever consolidation of bargaining units is available to it at the outset, the result, in moving away from the ultimate in fragmentation posed by *individual* branch bargaining units, would appear in any event to be a improvement administratively from the point of view of the employer.

28. It is important to note, of course, that the Board now has the power to combine bargaining units either subsequent to certification, or as they are organized, so that a larger, and per-

haps most appropriate, bargaining unit, may eventually be achieved. The addition of these powers, in our view, commends this reasoning even further.

29. Returning to the argument made by the employer in the present case concerning the meaning of fragmentation, it appears it appears in its essence to be a concern for the geography of the proposed unit, which is admittedly somewhat odd. It is difficult, however, to see how the combination of a unit in Toronto with one in Ottawa really differs, other than in the number of original units, with the combination orders issued by the Board in the *Cineplex Odeon* and *Hudson's Bay* cases. In the former case, the units combined spread over at least as large an area, and certainly did not fall into any obvious division of the employer's operations. Similarly, the combined unit in the latter case included Hudson's Bay stores in Windsor, Kitchener, Kingston, Brampton and Toronto. As in the present case, the stores in the proposed unit did not all fall into the same region for administrative purposes. In each of these cases, in the absence of any serious labour relations problems relating to the locations of the various stores, the Board did not consider geography to be determinative.

30. The second argument made by counsel for the employer with respect to fragmentation was that the usual reasons advanced for reducing fragmentation, as enumerated in prior decisions of the Board, are not present in the present case. These factors were reviewed by the British Columbia Labour Relations Board in *Insurance Company of British Columbia*, [1974] 1 Can. LRBR 403, and were adopted by this Board in *National Trust*, *supra*. According to this approach, the goals of reducing fragmentation are: administrative efficiency and convenience in bargaining; lateral mobility for employees; a common framework of employment conditions; and, industrial stability.

31. The employer submitted that administrative efficiency and convenience in bargaining was not a factor here because the employer would prefer to bargain the two units separately and has in fact established two separate bargaining committees. This begs the question, however, of how two separate rounds of bargaining, and the administration of two separate agreements, would impact on the union, which clearly favours a combined structure at least in part because of these very concerns.

32. Lateral mobility is also not an issue according to the employer, as there is no interchange of employees between these units. The union responds that this is not to say that employees would not be interested in transfers, certainly in the event of promotion, if this possibility was opened up through central bargaining.

33. The establishment of a common framework of employment conditions is not important here, the employer submitted, because the issues facing the employees in these regions may be different. It does seem, however, that the employees in the two units would have as much in common as not, given the central facts that they perform the same duties, have the same job classifications, and have enjoyed the same terms and conditions of employment. In the absence of evidence to establish the significant regional differences to which the employer adverted, a common framework of employment conditions would seem an obvious goal in these circumstances.

34. Finally, the concern for industrial stability is said to be mitigated by the fact that the two units are represented by the same union. It is not clear, however, how this would avoid the possibility of a multiplicity of strikes, or would eliminate competitive bargaining. Indeed, it seems that some problems around potential work stoppages, such as illegal strikes, may be exacerbated where the same union is involved.

35. Our conclusions that at least some of the *Insurance Bureau* factors are present here, and

thus that fragmentation is a concern, are confirmed by a review of how these factors have been applied in the Board's jurisprudence under section 7. In *Premark Canada Inc.*, [1993] OLRB Rep. June 540, a case cited to us by the employer, the Board was asked to combine an existing bargaining unit of employees working out of Richmond Hill with a new unit of employees based in Sudbury. In considering the employer's argument that fragmentation was not an issue, the Board acknowledged that it was not in issue in the same sense as it has been in other cases such as *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, but that the statute nonetheless requires a consideration of whether fragmentation will be reduced through combination. The Board went on to state that "if two separate bargaining units are retained, the union's concerns with regard to consistency in the terms and conditions of employment of individuals performing the same work could be borne out" (at paragraph 32).

36. Similarly, the Board made the following comment in *Cineplex Odeon*, a case where the facts were virtually indistinguishable to those here:

There was no evidence which would suggest that the usual reasons for reducing fragmentation including administrative efficiency and convenience, lateral mobility, a common framework of employment conditions, and industrial stability would not apply to this case. Indeed, the similarity in the functions performed by employees and their working conditions imply the contrary.

37. For all of the reasons discussed above, we find that the combination of the two units proposed would reduce fragmentation, which would itself tend to enhance viable and stable bargaining.

38. Having rejected the employer's arguments as to the absence of fragmentation, we must also dismiss its submissions about viable and stable bargaining and serious labour relations problems, as its position on these issues was indistinguishable from its position on fragmentation. Indeed, the employer conceded in reply argument that it had led no evidence to establish serious labour relations problems, asserting only that the geographic and administrative disparateness which formed the foundation of its argument on fragmentation would obviously lead to serious labour relations problems in the case of combination. On the facts as set out above, we are satisfied that any problems associated with regional conditions, the managerial structure, and the minor differences between conditions at the two locations could easily be dealt with in bargaining. These facts do not disclose serious labour relations problems so as to recommend against combination.

39. Having regard to the criteria set out in section 7 and in light of our conclusions above, we direct that the two bargaining units in the application before us be combined into a single unit. We remain seized with regard to any further remedial relief.

DECISION OF BOARD MEMBER R. W. PIRRIE: November 23, 1994

1. As in the *Cineplex Odeon* decision I share the concerns expressed by Mr. Wightman.

2. I have considerable difficulty with the efficacy of a single bargaining unit consisting of 10 employees in Toronto and 27 in Ottawa. While the legislation permits the Board to order such a combination, and some of the recent jurisprudence promotes the Board doing so, in this case I would have exercised our discretion and declined to order the combination.

2969-93-U Reginald Fitzgerald, Applicant v. Alex Keeney, Local 200, C.A.W., Responding Party v. Ford Motor Company Ltd., Intervenor

Duty of Fair Representation - Practice and Procedure - Reconsideration - Unfair Labour Practice - Complainant's request for reconsideration made six months after Board's decision - Board finding no reason to abridge time limit for reconsideration requests established by Rule 85 - Application for reconsideration dismissed

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

DECISION OF THE BOARD; November 14, 1994

1. This is an application pursuant to section 91 of the *Labour Relations Act*, alleging a violation of section 69 of the Act by the responding party.

2. The application was filed on November 24, 1993.

3. By letter dated November 30, 1993, the Board acknowledged receipt of the application, and advised the applicant that a Labour Relations Officer had been authorized to inquire into the application and to endeavour to effect a settlement. The applicant was further advised that the Officer would attempt to meet with the parties, and would then report back to the Board on the status of settlement efforts.

4. By letter dated December 16, 1993, the Labour Relations Officer wrote to the parties, confirming that arrangements had been made for a meeting between the applicant and representatives of the union and the employer on January 12, 1994, in Windsor. The letter stated further:

In consideration of the above arrangements, I have attached a request to withdraw your application which I provide for your signature. The withdrawal should be mailed to my attention at the Board's offices, 400 University Avenue, 4th Floor, Toronto, Ontario, M7A 1V4.

I will be contacting all parties subsequent to your meeting on January 12th.

5. Subsequent to this meeting, which the applicant advises took place, the applicant signed a form dated January 13, 1994 which states as follows:

ONTARIO LABOUR RELATIONS BOARD

File No: 2969-93-U

Between:

Reginald Fitzgerald

Applicant,

- and -

Alex Keeney, Local 200 - C.A.W.

Responding Party,

- and -

Ford Motor Company Ltd.

(Intervenor) - Responding Party.

The Applicant hereby seeks leave of the Board to withdraw his application in the above noted Board File.

"R.F."

Dated at Windsor this 13 day of Jan. 1994

"Reginald Fitzgerald"
Reginald Fitzgerald

6. Once this request to withdraw was received, the Board issued a decision dated January 13, 1994, granting leave to withdraw the application.

7. A copy of the decision dated January 13, 1994, was sent to the applicant on January 19, 1994.

8. There was no further contact between the applicant and the Board until a letter from a lawyer representing the applicant, dated June 28, 1994, was received at the Board on July 7, 1994. This letter is set out in full below, as it is significant to our d termination in this matter:

We are the solicitors for Mr. Reginald Fitzgerald, who has retained us to advise him concerning matters arising from his employment with Ford Motor Company of Canada in Windsor, Ontario ("Ford").

Mr. Fitzgerald advises us that he filed a complaint against his union, the Canadian Automobile Workers Local 200 at the Ford plant in Windsor under Section 91 of the *Ontario Labour Relations Act* for failure to act in good faith in processing a grievance on his behalf. Mr. Fitzgerald also advises that he was in contact with Mr. Tim Parker of the Ontario Labour Relations Board regarding the handling of this matter. He was subsequently advised in early 1994 that his file with the Board had been closed as he had signed some form of release or withdrawal form. Therefore, to assist us in properly advising Mr. Fitzgerald on these matters, would you please provide the undersigned with a copy of his complaint, all correspondence and documentation which you have on file relating to this complaint, including any release or withdrawal form that may have been signed by Mr. Fitzgerald.

In this regard, we enclose herewith a duly executed Consent Form authorizing you to release to the undersigned this requested information on behalf of Mr. Fitzgerald.

We would appreciate if this matter could be dealt with at your earliest convenience, as time is of the essence to ensure that Mr. Fitzgerald's rights are not adversely affected by any unavoidable delays.

Thank you for your anticipated cooperation in this matter and we look forward to receiving the requested information.

9. The Board provided copies of certain material in the file to the applicant, by letter dated July 19, 1994. Counsel for the applicant then wrote to the Board on July 27, 1994, filing a request for reconsideration of the decision dated January 13, 1994.

10. In making this request for reconsideration, the applicant acknowledges that he signed a request to withdraw the application and that he provided this request to the Labour Relations Officer. He asserts, however, that he was not fully advised of the nature of the form that he was signing and its consequences. He stated further that the provision of the form to him for signature was premature, as the application had not been resolved to his satisfaction at that time.

11. As noted above, the applicant was advised by letter dated January 19, 1994, enclosing a copy of the Board's decision dated January 13, 1994, that his application had been withdrawn by leave of the Board. The applicant does not dispute having been so notified of the consequences of his signing the request for withdrawal, and indeed his counsel specifically acknowledges in the letter dated June 28, 1994 that the applicant "was advised in early 1994 that his file with the Board had been closed as he had signed some form of release or withdrawal form".

12. Whether or not the applicant misapprehended the nature of his request for withdrawal at the time it was executed, it is difficult therefore to see how his confusion could have continued past his receipt of the Board's decision in January, 1994. Indeed, it does not appear that the applicant claims to have had any misapprehension about the effect of the withdrawal once he received the decision of the Board, as confirmed by the letter from his counsel cited above.

13. Rule 85 of the Board's Rules of Procedure provides as follows:

85. No request for reconsideration will be considered where it is filed thirty (30) or more days after the date of the Board's decision, except with the permission of the Board.

14. Given the sequence of events in this matter as detailed above, it appears to the Board that the applicant was in full possession of the facts relevant to his request for reconsideration at the time of his receipt of the Board's decision. No explanation for the subsequent delay between January, 1994 and June 28, 1994, when his lawyer first contacted the Board, is provided in his representations. Thus, this does not appear to be a case where the Board should abridge the time limit established by Rule 85.

15. We are satisfied that the applicant had an obligation, once he was aware that the effect of his signature on the withdrawal form was a withdrawal of the application, to promptly advise the Board if, as he now asserts, the request to withdraw had been made in error. For these reasons, the request for reconsideration is dismissed for delay.

16. We observe by way of closing, that the current attempt by the applicant to revive his complaint appears to have much to do with his dissatisfaction with the conduct of the responding party union subsequent to the withdrawal. As there was no written settlement of the application, the Board has no authority, in the context of the present application, to enforce any informal agreements made by the parties. In issuing this decision on the application dated November 24, 1993, however, we make no finding as to whether or not the withdrawal of that complaint is with prejudice to the applicant's right to file a further application concerning events detailed in that complaint, or occurring subsequently.

1977-94-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant v. 772427 - O/L. CDA. Inc. O/A c.o.b. Quality Suites by **Journey's End**, Responding Party

Bargaining Unit - Certification - Union applying to represent employees of respondent hotel and proposing bargaining unit excluding front desk staff - Employer proposing that front desk staff be included in unit on basis of its assertion that front desk employees spend 25 per cent of their time performing work ordinarily performed by members of union's proposed bargaining unit - Board finding union's proposed unit appropriate - Certificate issuing

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *F. B. Reaume* and *Pauline R. Seville*.

APPEARANCES: *Susan Philpott*, *T. Corrigan*, *Bill Hutton* and *Joelle Spadacini* for the applicant; *Dave Daniels*, *Diane Bergeron* and *Leanne Wallace* for the responding party.

DECISION OF VICE-CHAIR RUSSELL G. GOODFELLOW AND BOARD MEMBER PAULINE R. SEVILLE; November 28, 1994

1. The name of the responding party in the title of proceedings has been amended to read: "772427 - O/L. CDA. Inc. O/A c.o.b. Quality Suites by Journey's End".
2. This is an application for certification.
3. The issue is the appropriateness of the applicant's proposed bargaining unit. The unit claimed by the applicant to be appropriate for collective bargaining is:

all employees of 772427 - O/L. CDA. Inc. c.o.b. as Quality Suites by Journey's End at 262 Carlingview Drive, Etobicoke, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, accounting staff, front desk staff, and students employed during the school vacation period.
4. The unit claimed by the respondent to be appropriate for collective bargaining is:

all employees of 772427 - O/L. CDA. Inc. c.o.b. as Quality Suites by Journey's End at 262 Carlingview Drive, Etobicoke, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, accounting staff, and students employed during the school vacation period.
5. The difference between the two units relates to the front desk staff. The respondent proposes their inclusion. The applicant seeks their exclusion. On the basis of the documentary evidence of membership filed with the Board, the applicant's position would result in automatic certification. The respondent's position would result in a vote.
6. There was no dispute that the appropriate test to be applied by the Board is set out in the following passage from the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.
7. The respondent acknowledges that the applicant's proposed bargaining unit meets the first part of this test. The issue is with respect to the second part. The respondent asserts that the

unit proposed by the applicant would cause “serious labour relations problems”. These problems relate to the “fragmentation” of its work force. In particular, the respondent raises the possibility of jurisdictional disputes in the event another trade union acquires the right to represent front desk staff, the possibility that grievances could arise under a collective agreement over the entitlement of front desk staff to perform bargaining unit work, and the possibility of disputes arising over the entitlement of front desk staff to perform bargaining unit work in the event of a strike to which the replacement work provisions of the Act apply. As a further basis for rejecting the applicant’s proposed unit, the respondent raises the possibility that the applicant might later seek to organize front desk staff and then apply for a combination of bargaining units. According to the respondent, all of these possibilities are “reasonably foreseeable” given the substantial overlap in duties between the front desk staff and those whom the applicant seeks to represent.

8. The Board heard evidence from the employer’s general manager, Leanne Wallace. Ms. Wallace testified that, on average, front desk employees spend approximately 25 per cent of their time performing work which is ordinarily performed by members of the applicant’s proposed bargaining unit. This would include various housekeeping, mini-bar and continental breakfast tasks. Ms. Wallace testified that front desk staff perform this work on both a scheduled and non-scheduled basis. Although Ms. Wallace’s initial testimony did not appear to suggest that the scheduled activities constitute any lesser portion of the total overlap than the non-scheduled tasks, a subsequent review of the schedules for the three month period immediately preceding the application date, which were produced at the request of the union and by order of the Board, revealed that there were very few occasions on which front desk employees were actually scheduled to perform the disputed tasks. Moreover, the scheduled assignments appear to have been shared among only three of the 12 or 13 front desk employees, with only one of those employees performing the tasks other than in the first two weeks. The bulk of the 25 per cent overlap, then, would appear to arise on a non-scheduled basis.

9. Ms. Wallace testified that the cross-utilization of front desk personnel is essential to the respondent’s business plan, which is to offer suites at prices that would be charged for a room in a full service hotel. Payroll is one of the respondent’s main costs. Counsel for the respondent asserts that the Board must take the employer as it finds it, including its business plan, when assessing the seriousness of the labour relations problems associated with the applicant’s proposed unit. In the words of counsel, what may be a “mere inconvenience for one employer may constitute serious labour relations problems for another”.

10. Despite the able submissions of counsel for the employer, we are satisfied that the applicant’s proposed unit is appropriate for collective bargaining. Even accepting the evidence of Ms. Wallace described above as an accurate reflection of the degree of overlap in duties between the front desk staff and those whom the applicant seeks to represent, we believe that the problems identified by the employer are neither sufficiently serious nor certain as to cause us to reject the unit sought.

11. Collective bargaining is not a neutral institution. It imposes burdens on employers as well as employees. Typically, employers lose a degree of independence in the direction of the working forces, and wages may go up. Employees are required to pay union dues, and sacrifice a degree of individual autonomy to collective action. These are predictable outcomes of the exercise of employee freedoms protected by the *Labour Relations Act*.

12. In this case, underlying the employer’s position appears to be the assertion that it will suffer some unquantified economic hardship if the trade union acquires the right to represent persons employed in housekeeping, food and beverage, and related functions but not front desk staff.

It also suggests that it may incur some organizational difficulties in the event of a strike, that disputes over work jurisdiction may arise and that if the union might later seek to organize front desk staff and bring a combination application, the Board ought to determine that the broader unit is appropriate now.

13. In our view, and without articulating what problems would be sufficiently serious to deny a trade the unit applied for, we believe that the employer's concerns can be accommodated in the give and take of collective bargaining.

14. We begin by noting that the tasks in question, although said to constitute a "regular" part of the duties of the front desk staff, appear to be, essentially, of a "relief" or "supplemental" nature. They are the "core" functions of the housekeeping and food and beverage classifications, not those of the front desk staff. In these circumstances, jurisdictional disputes must be seen as neither inevitable nor insoluble. Their occurrence and resolution depend upon a variety of factors including the advent of another trade union in the workplace and the parties' inability to come to agreement on the proper scope of work associated with each bargaining unit. Likewise, the absence of "watertight compartments" surrounding job classifications means that grievances under a collective agreement over the entitlement of front desk staff to perform bargaining unit work are neither unavoidable nor guaranteed of success.

15. Similarly, it is far from clear that the application of the replacement worker provisions in the event of a strike would restrict an employer's ability to utilize non-bargaining unit personnel in precisely the same manner as they were being utilized by the employer prior to the strike. Whether this issue will need to be litigated depends upon such factors as the occurrence of a strike, the similarity of these facts to any previous Board decisions, the parties' inability to agree, and so on. The further suggestion that the union might later attempt to organize front desk staff and then apply for a combination of bargaining units is speculative and does not provide any independent basis for determining whether the unit applied for now is appropriate.

16. Last, but not least, we point out that the applicant's proposed unit, if not the standard in the hotel industry, is far from uncommon. The applicant produced seven certificates granted to it by this Board since 1983 in which front desk staff were not included with the kinds of classifications covered by the applicant's proposed unit.

17. Accordingly, and for all of these reasons, we find that the bargaining unit set out in paragraph 3 of this decision is appropriate for collective bargaining.

18. The Board further finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

19. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on September 6, 1994, the certification application date, had applied to become members of the applicant on or before that date.

20. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER F. B. REAUME; November 28, 1994

1. I respectfully dissent from the majority decision in this matter.

2. There is no doubt that this business venture has made it a practice to utilize the front

desk staff, when and as required in the normal service areas of the hotel, both on a scheduled and an emergency basis. The only credible evidence we heard in this regard, given by Ms. Wallace, suggested that this could be as much as 25% of the front desk time in a given period.

3. Although union counsel expressed confidence that any overlap of duties could be taken care of in the bargaining process, I remain skeptical in this particular instance.

4. As a result, I believe that the exclusion of the front desk staff will unduly fragment the overall labour relations of the parties in this case.

5. As a result of the above, I would have included the front desk staff in the bargaining unit to preserve the established community of interest.

2229-94-R IWA - Canada, Applicant v. Kent Trusses Limited, Responding Party

Bargaining Unit - Certification - Employer engaged in manufacture and sale of roof trusses and operating plant in Township of Strong and yard in Town of Sunridge - Union applying to represent employees at plant only - Employer submitting that unit should include both plant and yard employees - Board finding union's proposed unit appropriate - Certificate issuing

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *W. A. Correll* and *P. Seville*.

APPEARANCES: *David Wright, Rene Brixhe* and *Diane Roberts* for the applicant; *P. Straszynski, Mike Kent* and *Janice Kent* for the responding party.

DECISION OF THE BOARD; November 30, 1994

1. This is an application for certification in which the parties have been unable to agree on the description of the appropriate bargaining unit.

Preliminary Issue

2. The Application for Certification (Form A-1) describes the unit of employees of Kent Trusses Limited ("Kent" or the "employer") that the applicant ("IWA-Canada" or the "union") claims to be appropriate for collective bargaining as follows:

all employees of Kent Trusses Limited at its plant in the Town of Sundridge, save and except supervisors, persons above the rank of supervisor, office and sales employees, engineering and designing employees, distribution centre/highway yard employees, truck drivers, mechanics, quality control supervisor and students employed during periods of school vacation.

The employer has two locations. A plant in the Township of Strong and a yard in the Town of Sundridge.

3. The Notice to Employees of Application for Certification and of Hearing (the "green sheets") posted by the employer in the workplace on September 28, 1994 indicated that the above described unit was being sought by the union. On September 29, 1994 the Board received an untimely petition signed by individuals employed by Kent at its plant ("objecting employees")

which indicates that they are opposed to a union in Kent's "Production Department". The petition is signed by 29 of the 31 people employed at the plant.

4. At the commencement of the hearing of this matter, counsel for Kent brought a preliminary motion that the application be dismissed on the basis that the plant for which the applicant seeks bargaining rights is located in the Township of Strong and not the Town of Sundridge as indicated in the application and green sheets. Counsel argued that the error may have resulted in confusion such that the application should be dismissed.

5. After hearing the submissions of the parties and considering the correspondence referred to in paragraph 3, the Board ruled orally that the motion was denied. In the Board's view, the bargaining unit description set out in the application and green sheets indicates with sufficient clarity that the union is seeking to represent employees employed at Kent's plant. We are satisfied, based on the correspondence received from the objecting employees, that the employees were not confused by the error. The error is a technical one which did not result in any prejudice. The error is not one which would cause the Board to dismiss the application.

Merits

6. As indicated above, the parties are in disagreement as to the description of the appropriate bargaining unit. The applicant seeks a unit comprised of employees of Kent (with specified exceptions) at Kent's plant (a "plant unit"). It is submitted on behalf of Kent that a unit restricted to the plant would result in serious labour relations problems and that the appropriate unit is a unit (with specified exceptions) comprised of employees at both the plant and the yard.

7. Kent is engaged in the manufacture, sale and distribution of roof trusses, wall panels and beams. Kent's manufacturing plant, located in the Township of Strong, is 1.8 kilometres away from its storage and distribution yard located in the Town of Sundridge. There are 31 employees at the plant in the bargaining unit sought by the union. There are 12 employees at the yard.

8. The plant is located on six acres of property. This property houses Kent's Head Office, two manufacturing buildings and one maintenance building in addition to areas designated for lumber storage, material handling and temporary truss storage. The classifications of employees at the plant include lumber graders, sawyers, assemblers, material handlers and maintenance personnel.

9. The yard is situated on a site comprising 25 acres. There is only one structure on this property measuring 72 x 160 feet. Half of this structure is used by the mechanics to maintain the forklifts used at both the plant and the yard as well as Kent's fleet of delivery vehicles which are housed at the yard. The other half of the structure is used for manufacturing purposes. The individuals employed at the yard are classified as handlers, drivers and vehicle maintenance persons.

10. All drivers employed at the yard report to the Shipping Manager. The Shipping Manager is responsible for their performance, punctuality and attendance. The vehicle mechanic employed at the yard reports to the Vehicle Maintenance Manager who, likewise, is responsible for the vehicle mechanic's performance, punctuality and attendance. There is a separate time clock at the yard where the yard employees clock in and out. The plant employees report through their respective foremen to the Plant Manager. The Plant Manager is responsible for their performance, punctuality and attendance. The plant employees all clock in and out at the plant.

11. All product is sold through a central sales department. Any design of items sold by Kent is done by a central design department. There is one central engineering department and all of the administration and accounting functions are performed centrally. The company has a single pay-

roll. All employees of Kent participate in a profit sharing plan, benefits, a production bonus, a training incentive program, an employee assistance program and a group RRSP which are administered by a central accounting department.

12. Kent has one post office box number for both the plant and the yard. Kent has a centralized phone system and communicates between the plant, head office and the yard by way of two way radios. The company has a centralized computer system which connects the various buildings.

13. The General Operations Manager is responsible for all aspects of manufacturing and distribution as well as ensuring that Kent's commitments to its customers are met. The General Operations Manager oversees and is responsible for hiring and firing personnel at both sites and sets all employee wages. Employees from both the plant and the yard serve on the company's single Health and Safety Committee.

14. Trusses are manufactured predominantly at the plant following which they are shuttled by a plant employee to the yard where they are either unloaded for storage or loaded onto a truck to be delivered by a driver to the customer. Wall panels are produced at both the plant and the yard. The panels are cut at the plant and then moved to the yard where they are assembled. Wall panels are always sold in combination with trusses. The beams sold by Kent are manufactured by Kent's suppliers. Kent manufactures items to accompany the beams. The modification of beams, if required, is done at the plant or the yard depending upon the type of modification required. The materials produced by Kent to accompany the beams are produced at the plant. The sale of trusses packaged with beams makes up approximately 50 percent of the company's revenues. The company manufactures specialty hangers which are produced by the maintenance staff at the plant. These hangers hold beams together. Following manufacture the hangers must be sent by the plant to the yard in order to be packaged with the beams prior to the delivery date. The majority of sales would involve two or more products in combination.

15. With respect to the issue of employee interchange, the maintenance foreman at the plant is primarily responsible for ensuring that equipment is in good working order and is well maintained. In addition, however, from time to time the maintenance foreman may fabricate jiggling and hangers, carry out millwright duties and electrical changeovers and perform some welding at the yard. The maintenance foreman has not performed any millwright duties at the yard recently and the last electrical work performed at the yard was last spring. This individual reports to the Plant Manager and clocks in and out at the plant.

16. There is a mechanic who is responsible for the maintenance of vehicles used at both the plant and the yard. This mechanic works out of the yard and primarily repairs forklifts from the plant at the yard. However, if a forklift at the plant breaks down such that it cannot be transported to the yard, the mechanic would go to the plant in order to effect the repairs. Kent's sole witness, Mr. Mike Kent, could not recall the last time the mechanic did work at the plant.

17. One individual at the plant, Doug Dobbs, holds the position of yard and plant maintenance. Mr. Dobbs works three nights a week as a night watchman at the plant and two days a week during which he cleans all of the buildings and picks up garbage at both the plant and the yard. The amount of time he would spend at the yard varies with the amount of work to be done. It was estimated that he would spend anywhere from a few minutes to a few hours each week at the yard. Mr. Dobbs recently spent a day removing brush along the yard fence. Mr. Dobbs reports to the Plant Manager and clocks in and out at the plant.

18. There is one individual employed out of the plant who drives the shuttle truck and has

the job of shuttling materials between the plant and yard. The drivers employed by Kent out of the yard are primarily responsible for delivering material to customers. The drivers also move trusses from the plant to the yard if the trusses are too large to be shuttled. In addition, if the company elects not to operate the shuttle truck, the drivers move material from the plant to the yard.

19. The company is typically slow during the winter months and accordingly, in the past, has assigned one or more of the drivers to non-driving duties. For example, in the past, a driver has been assigned to material handling duties at both the plant and the yard during the winter months. In this capacity the driver assisted in moving trusses and helped out in the maintenance shop. The driver continued to report to the Shipping Manager at the yard and clock in and out at the yard. Drivers have also been assigned to assist with banding or operate equipment from the yard to perform snow removal at both the plant and the yard. The drivers assigned to perform these tasks remained under the responsibility of the Shipping Manager and continued to clock in and out at the yard.

20. At present, an individual who is employed as a forklift driver at the plant has taken up duties at the yard in order to fill in for a yard employee who is off work due to illness. The employee's time card was transferred from the plant to the yard. An employee who had been on layoff was brought back to work in order to fill the resulting vacant position at the plant. When the employee who is presently off sick returns to work, the forklift driver will be returned to the plant and the employee who has been recalled will, presumably, be returned to layoff unless there are sufficient other duties to keep him employed.

21. In addition, on occasion throughout the year, plant staff disassemble old trusses and do housekeeping duties at the yard. Drivers from the yard frequently go to the plant to pick up product for delivery to a customer. The yard maintenance personnel act as back up for plant maintenance personnel depending upon the time of the year and the situation. In the past, plant staff have been called upon to assist yard staff with the assembly of wall panels.

22. It is argued on behalf of Kent that a bargaining unit comprised solely of employees at the plant will reduce the company's flexibility and ability to respond to the wide fluctuations in demands which it experiences throughout the year. Kent argues that it is very important that its employees be able to perform whatever duties are required by the circumstances at any particular time. Further, it is argued that the operations of the plant and the yard are interdependent such that, should there be a work stoppage at either the plant or the yard, the other facility would be unable to continue operations. Therefore, in order to avoid multiple work stoppages, a unit comprised of both plant and yard employees is sought. Kent further argues that, at present, the entire company has one focus, namely, getting the product to the customer on time and that, if the workforce is split into two units, such single focus will be lost. Finally, it is suggested that, at present, all employees are on a level playing field. If the plant employees comprise a unit separate from the yard employees, some employees will have greater strength than other employees. Accordingly, it is argued that a unit comprised solely of plant employees would cause Kent serious labour relations problems and the Board should find a unit comprised of both plant and yard employees to be an appropriate bargaining unit.

23. In *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 at paragraph 23, the Board indicated that determining the appropriateness of a bargaining unit involves answering the following question:

... does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

24. In the present case, the responding party does not contest, and we so find, that the plant employees share a sufficient community of interest that they can bargain together on a viable basis. The sole issue is whether they can do so without causing serious labour relations problems for the employer.

25. Kent asserts that a bargaining unit confined to the plant will restrict its ability to move employees between the plant and the yard thereby causing it serious labour relations problems. We note that much of the employee movement which presently takes place between the plant and the yard would not be restricted by the Board's certification of the applicant for a plant unit. For example, the evidence with respect to the mechanic establishes that he primarily works at the yard repairing forklifts from both the plant and the yard as well as delivery trucks housed at the yard. There is no one working at or out of the plant who performs similar job functions. Accordingly, on an infrequent basis, when a forklift breaks down at the plant, the mechanic will attend at the plant to effect the repairs. During the period of the mechanic's trips to the plant he remains under the supervision of the Vehicle Maintenance Manager and continues to clock in and out at the yard. He is not transferred to the plant and while at the plant does not perform any job functions which would normally, or otherwise, have been performed by a plant employee. Such movement does not involve an employee transfer into or out of the bargaining unit and would not appear to be restricted by the applicant's certification with respect to a unit of plant employees.

26. The same analysis applies to the maintenance foreman, Mr. Dobbs, the shuttle truck driver and the delivery truck drivers. Each of these individuals have specific job functions which are not duplicated (except to the limited extent that the delivery truck drivers may do some infrequent shuttle work) by employees at the other location. When these individuals move from their home location (the location where they clock in and out and are supervised of out) to the other location they do not do so for the purpose of performing job functions normally performed by employees at the other location. Rather, they continue to perform their own individual identifiable set of job functions. Such employee movement would not likely be restricted by the existence of a plant unit and thus does not support an argument that a plant unit would cause Kent labour relations problems. These are not examples of employee interchange, but of employees who perform part of their work at the location where the bargaining unit (if granted) is found.

27. The only evidence of employee interchange *which would potentially be restricted* by the Board's certification of the applicant for a plant unit consists of a single transfer of a plant employee to the yard and back-up activity performed by both plant and yard employees. Although employee interchange of this nature has been viewed by the Board as creating the potential for serious labour relations problems, it is typically only found to do so where it is significant and occurs on a regular basis. As indicated above, there has only been one employee transfer between the plant and the yard. The only evidence adduced as to the frequency, regularity or quantity of the back-up activity performed is that it occurs "depending on the time of year and the situation". In the Board's view, the evidence does not establish that the level of employee interchange which has historically existed at Kent is either significant or sufficiently regular such that its restriction would cause Kent serious labour relations problems.

28. Kent argues that permitting a unit confined to the plant would cause fragmentation and the potential for multiple work stoppages. We do not find the negative consequences normally associated with fragmentation to be compelling in this case. Presently, none of Kent's employees are unionized. The "fragmentation" which this employer potentially faces is a maximum of two bargaining units (excluding the possibility of clerical unit which the responding party does not contest should be excluded from the unit). Although the potential for two bargaining units may not,

from Kent's perspective, be the optimal result, it certainly does not raise the spectre of seriously disruptive fragmentation.

29. Finally, Kent argues that a bargaining unit confined to the plant will divide the employees and give some employees greater strength than others. Thus, the employer argues that everyone in its workplace should be unionized, or no one should. Virtually, every unionized workplace employs both union and non-union employees, and this reality is no reason not to find appropriate an otherwise appropriate bargaining unit. If the employer were right, all organizing would demand that the entire employer workforce form one bargaining unit. To require this would render largely meaningless the requirement in the statute that the Board determine "an" appropriate bargaining unit, as there would only be one appropriate all encompassing unit. It would also reverse decades of jurisprudence, and practice, and create serious and unwarranted impediments to organizing. In the circumstances of this case, the fact that one group at one location will be unionized, and the group performing different functions at the other location will not be, is not a reason why we would find the applicant's proposed bargaining unit to be inappropriate.

30. At the conclusion of the hearing the parties advised the Board that they were in agreement as to the language of the bargaining unit description the Board should adopt if it was to find the applicant's proposed unit to be appropriate. Accordingly, the Board finds that all employees of Kent Trusses Limited in the Township of Strong, save and except foremen, persons above the rank of foreman, office, clerical and sales employees, engineering and designing employees, and students employed during periods of school vacation, constitute a unit of employees of the responding party appropriate for collective bargaining.

31. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

32. Following the hearing the Board received a number of letters from employees of the responding party requesting that their membership card be returned to them and implying that their card should not be considered by the Board in determining the level of the applicant's membership support. These letters are either evidence of the authors' desire to revoke their membership or application for membership in the applicant or requests to make representations to the Board concerning the applicant's conduct in the course of collecting membership cards. Section 8(4) of the Act provides that the Board shall not consider evidence that an employee has revoked his or her membership in a trade union if filed after the certification application date. The Board's Rules of Procedure stipulate that any allegations of improper conduct must be made promptly after finding out about the conduct. In the present case, notwithstanding that the employees were advised of this application by way of the green sheets and informed of their right to file representations, no allegations were raised until after the hearing was concluded. In these circumstances the Board does not consider the allegations to have been made promptly and will not consider this evidence.

33. The Board is satisfied, on the basis of all the evidence before it, that more than 55 per cent of the employees of the responding party in the bargaining unit on September 26, 1994, the certification application date, had applied to become members of the applicant on or before that date.

34. A certificate will issue to the applicant with respect to the bargaining unit described in paragraph 30.

2288-94-R United Steelworkers of America, Applicant v. Lencan Investigation Services Inc., Responding Party

Practice and Procedure - Sale of a Business - Union alleging sale of a business under section 64.2 of the Act and pleading material facts sufficient to ground the application - Respondent not filing reply - Board applying Rule 19 and deeming respondent to have accepted facts set out in application - Board declaring sale of a business

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *S. C. Laing* and *R. R. Montague*.

DECISION OF THE BOARD; November 29, 1994

1. This is an application under section 64.2 of the *Labour Relations Act* which provides for a deemed sale of a business to have occurred in certain industries including the security services industry.

2. This application was filed by the union on September 29, 1994. In the normal course, notice was given to both the predecessor employer Pinkerton's of Canada Ltd. ("Pinkerton's") and the alleged successor employer Lencan Investigation Services Inc. ("Lencan"). Along with the notice of the application and hearing the Board sent a notice for posting by the employer to give the affected employees notice of the application and the terminal date. This was apparently received by Lencan Investigation Services Inc. because on October 12, 1994, the Board received back from Len Tremblay, President of Lencan Investigation Services Inc. a form indicating that Lencan had received for posting the notice to employees and that it had indeed been posted. The fact of posting was also confirmed by the union.

3. The notice to the responding party indicates clearly, at paragraph 10 that if they wish to participate, a response must be filed by the terminal date which in this case was October 14, 1994. As well, the form includes at the bottom in bold type a section called "Important Note". The second paragraph of that note reads as follows in bold faced-type:

"If you do not file your response and other documents in the way required by the rules the Board may not process your application and documents, you may be deemed to have accepted all of the facts stated in the application, and the Board may decide the case on the material before it without any further notice to you".

[emphasis added]

4. On November 18, 1994 the Board received a letter dated November 15, 1994 from the union asking for the Board to apply Rule 19 of the Rules of Procedure and grant the relief sought in the application without a hearing.

5. Rule 19 reads as follows:

19. If a party receiving notice of an application does not file a response in the way required by these Rules, he or she may be deemed to have accepted all of the facts stated in the application, and the Board may decide the case upon the material before it without further notice.

It will be readily seen that it is this Rule that is paraphrased in the portion of the "Important Note" section of the notice to the employer set out above.

6. We have considered the union's request in light of Rule 19 and are of the view that the application should be granted. Our reasons follow.

7. Sections 64 and 64.2 provide, in relevant part, as follows:

64.(1) In this section,

“business” includes one or more parts of a business; (“entreprise”)

“predecessor employer” means an employer who sells his, her or its business; (“employeur précédent”)

“sells” includes leases, transfers and any other manner of disposition; (“vend”)

“successor employer” means an employer to whom the predecessor employer sells the business. (“employeur qui succède”)

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

• • •

(2.2) If the predecessor employer has given or been given a notice relating to bargaining for a collective agreement or has requested the appointment of a conciliation officer or mediator, the successor employer is considered to have given or been given the notice or to have made the request, until the Board declares otherwise.

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

• • •

64.2-(1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.

(2) This section does not apply with respect to the following services:

1. Construction.
2. Maintenance other than maintenance activities related to cleaning the premises.
3. The production of goods other than goods related to the provision of food services at the premises for consumption on the premises.

(3) For the purposes of section 64, the sale of a business is deemed to have occurred,

- (a) if employees perform services at premises that are their principal place of work;
- (b) if their employer ceases, in whole or in part, to provide the services at those premises; and
- (c) if substantially similar services are subsequently provided at the premises under the direction of another employer.

(4) For the purposes of section 64, the employer referred to in clause (3)(b) is considered to be the predecessor employer and the employer referred to in clause (3)(c) is considered to be the successor employer.

(5) This section shall be deemed to have come into force on the 4th day of June, 1992.

8. The union has pleaded material facts sufficient to ground an application under section 64.2. It outlines a situation in which it gained bargaining rights for the affected employees in 1993. In attempting to exercise those rights, it was informed by Pinkerton's that they no longer held a contract and that Lencan had taken over the contract to provide security services on May 1, 1993.

9. Notice to bargain was given to Lencan on February 1, 1994 and various kinds of contact occurred between the parties resulting in a conciliation meeting on August 19, 1994 at which the responding party Lencan advised the applicant that they did not recognize them as the bargaining agent for the employees at the site.

10. The application pleads that the employees in question work at the same site at 701 Baxter Road, Ottawa, as they did for Pinkerton's and that the work is substantially similar.

11. We are satisfied that the facts as pleaded fall within the ambit of section 64.2 in that a sale of a business would be deemed to have occurred on those facts as Pinkerton's the employer of the employees performing the security services at the site in question ceased to provide those services and substantially similar services were subsequently provided under the direction of another employer, Lencan at the same site.

12. Rule 19 has been in the Board's Rules of Procedures since January 1993. One of its purposes is the avoidance of time and expense to all parties and the public, when an application is undisputed.

13. In the circumstances of this case, we are satisfied that Lencan received notice of the application as it responded with its return of posting that was sent with that notice. The notice is clear as to the consequences of not responding. The facts as pleaded appear straight-forward and would entitle the applicant to the relief claimed. In these circumstances, and in light of the material before us, we find no reason not to apply Rule 19 and substantial reason to apply it.

14. Accordingly, based on the undisputed material before us, the responding party is deemed to have accepted the facts as set out in the application and the Board declares that a sale of a business has occurred from Pinkerton's to Lencan and that the applicant continues in the same position in respect of the employees at the site at 701 Baxter Road, as if Lencan were Pinkerton's.

15. The Board will remain seized if there are any problems implementing this decision.

0865-94-OH Jason James, Applicant v. MLG Enterprises Limited, Responding Party

Discharge - Health and Safety - Employer not satisfying Board, on balance of probabilities, that complainant's health and safety activities not at least part of reason for his discharge - Complainant subsequently finding new employment and not seeking reinstatement - Complaint allowed - Damages ordered

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *W. A. Correll* and *P. V. Grasso*.

APPEARANCES: *Linda Vannucci-Santini* for the applicant; *James Wheeler* for the responding party.

DECISION OF LEE SHOULDICE, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO; November 28, 1994

1. This is an application under section 50 of the *Occupational Health and Safety Act* ("the Act"), alleging that the applicant ("Mr. James") was discharged from his employment by the responding party ("the employer" or "MLG") contrary to sections 25, 43 and 50 of the Act.

2. The litigation of this matter extended over three hearing dates. The Board heard the evidence of the applicant, Mr. Gary Burns (the plant engineer at MLG), and the president of MLG, Mr. Terrance McCann. The evidence of the witnesses was, in many respects, entirely contradictory. Accordingly, it has been necessary for the Board to make determinations regarding the credibility of the witnesses. In that respect, in making findings related to credibility the Board has considered factors such as the demeanour of the witness, the ability of the witness to avoid the tug of self-interest, and what a reasonable person would expect to have occurred in the circumstances. We will make specific comments relating to credibility throughout the decision as we discuss the various incidents which occurred both before and during Mr. James' employment with MLG.

3. The general parameters and the legal principles applicable to this proceeding are not in dispute. Mr. James was employed by MLG, effective April 11, 1994, as its shipper/receiver/packer. On May 4, 1994, Mr. James' employment with MLG came to an end. Mr. James alleges that the decision to terminate his employment was based, in part, on his work refusal of April 26, 1994, and that MLG has violated the Act. MLG, on the other hand, alleges that the sole reason for the applicant's termination from its employ was his absences from work in late April and early May, 1994. There is no dispute that, if the decision to relieve Mr. James of his employment related, even in part, to a work refusal under the Act, that decision would be in violation of the Act. (See, for example, *Commonwealth Construction Company* [1987] OLRB Rep. July 961.) There is also no dispute that the burden of proof in this case lies with the employer, and that it must establish that, on the balance of probabilities, it has not violated the Act.

The Facts

4. As noted above, Mr. James was first employed by the employer effective April 11, 1994. The week prior to starting with MLG, Mr. James was interviewed for the position of shipper/receiver/packer. The parties disagreed as to the substance of this interview. Mr. James, who at the time was (and still is) employed by National Grocers, was absent from work at National Grocers having recently suffered a work-related accident and had been seeking a second job. He was scheduled to attend a number of medical appointments in April and May, 1994, and testified that he told Mr. Burns, who interviewed him, that he would be required to attend at the medical

appointments (one on April 18, 1994 and one on April 29, 1994) as well as “a few more” in the future. According to Mr. James, Mr. Burns said nothing about this request during the interview process, except to ask for a few days notice of the appointments. Mr. James was, during the interview process, given a “test” on a reach truck, and testified that he told Mr. Burns that he had no experience on a reach truck at that time.

5. Mr. Burns’ recollection of the interview is markedly different. Mr. Burns stated that Mr. James told him that he had operated reach trucks at National Grocers, and that he discovered only after an industrial accident on April 26, 1994 (that led to Mr. James’ refusal to work) that this was not the case. Furthermore, Mr. Burns stated that he was advised of only one medical appointment that Mr. James would have to attend respecting his workers’ compensation claim. Mr. Burns told the Board that Mr. James characterized this one appointment as being a “formality”. As well, Mr. Burns stated that he told Mr. James at the outset of employment that MLG paid for only one sick day and emphasized to Mr. James that because of the small size of the operation (Mr. Burns and Mr. James would be to sole employees in the warehouse) it was important to attend work regularly.

6. Having considered all of the evidence, we are of the view that it is more probable than not that Mr. James did not advise Mr. Burns of the full extent of his future medical appointments. Mr. James conceded that he was aware that other candidates for the vacant position were being interviewed, and it is unlikely that he would emphasize as bluntly as he says he did the likelihood that he would be required to absent himself from the plant numerous times so soon into the employment relationship. It is more likely that Mr. James downplayed the full extent of his medical appointments during the interviewing process rather than highlighting them, especially in light of Mr. Burns’ concern that the small size of the operation required an individual with good attendance to fill the vacancy.

7. On the other hand, we are of the view that it is more probable than not that Mr. Burns was advised, as was testified to by the applicant, that Mr. James was not an experienced reach truck operator. Mr. Burns testified that he had been employed by MLG for six months at the time of hiring and that this was his first hire. An ability to drive a reach truck and to properly operate it is fundamental to the vacant position. Mr. James provided his supervisor at National Grocers as a reference to Mr. Burns, who did, in fact, call for a reference before hiring Mr. James. If Mr. James did mislead Mr. Burns into believing that he could operate a reach truck it is unlikely, in our view, that he would have given his immediate supervisor as a reference, as it would be expected by Mr. James that his supervisor would disclose his lack of experience on the reach truck. We are of the view that it is probable that Mr. Burns was aware that Mr. James did not have experience operating a reach truck but chose to hire him as a result of an actual driving test which was given to Mr. James at the time of the interview.

8. The incident that is central to this proceeding occurred on April 26, 1994. At approximately 8:30 a.m., one-half hour into Mr. James’ regularly scheduled eight hour shift, he was manoeuvring the reach truck into position to remove a skid of product from some racking. After properly manoeuvring the vehicle, and inserting the forks of the reach truck into the slots of the skid on the rack, he raised the skid in order to remove it from the rack. As a result of three boxes which were stacked on the back portion of the skid, when the skid was lifted it dislodged the top portion of the racking which caused the product on the top level of the rack to fall to the racks (and elsewhere) below. Although the witnesses who testified each had a rather predictable opinion as to who was at fault for this accident, we do not feel it is necessary for us to reach any conclusions in that regard. Suffice it to say that the result of the incident was that the racking became dislodged, and that six, 50 lb. bags of wheat starch, to a lesser or greater extent, fell from the racks.

9. Mr. James was, at the time of the accident, protected within the safety cage of the reach truck. (We note here that the parties disagreed as to the degree of safety that the reach truck provided to the driver. Once again, we do not believe it necessary to reach any conclusions regarding this dispute.) However, it is evident that the accident upset Mr. James. Mr. Burns later told an inspector of the Ministry of Labour that Mr. James was “clearly shaken” by the accident. Mr. James advised Mr. Burns of the accident immediately after it occurred and testified that Mr. Burns was angry over what had happened. Mr. Burns testified, in chief, that his reaction to the accident was to remark that “we all make mistakes” but conceded in further testimony that he was “upset” though not “angry”. In our view, whether one characterizes the situation as one of “anger” or “upset”, it is fair to say that Mr. Burns was not pleased with what had happened.

10. The events immediately following the accident are in dispute. According to the applicant, Mr. Burns wanted him to clean the mess that had resulted on and around the racking. Mr. James stated that he told Mr. Burns that he would not do so because of the dangerous state of the racking. According to the applicant, he took a regularly scheduled break and then was assigned by Mr. Burns to fill 5 kg. jugs of molasses in a safe area in the plant. The applicant testified that Mr. Burns stated that he would clean the mess but thereafter repeatedly asked Mr. James to help him clean. Mr. James stated that he responded to Mr. Burns on each occasion that he would do anything else but that. At approximately 10:00 a.m., Mr. James stated that he went home because there was no further work to do and the cleaning work was unsafe. Mr. James testified that he advised Mr. Burns of his opinion in that regard before leaving.

11. Mr. Burns, on the other hand, states that he and Mr. James discussed the incident and that he advised Mr. James that he did not have to work in the area in dispute until both of them were satisfied that it was safe to do so. Alternate labour, in the form of filling the jugs of molasses, was assigned to Mr. James. Mr. Burns testified that just before 10:00 a.m. Mr. James advised him that he had to leave and would return when the job was safe. Mr. Burns stated that he told Mr. James that there was much to do around the plant and needed him to stay, and that he “pleaded” with Mr. James to stay.

12. Having considered this evidence, it is evident to the Board that Mr. James departed from the warehouse because of his concerns related to the safety of the premises. It was his testimony that Mr. Burns was in the process of cleaning up some of the mess while he was filling the jugs of molasses and it is, in our view, more probable than not that Mr. Burns requested the applicant’s help in the cleaning of the accident site, on more than one occasion. We do not believe Mr. James’ testimony that there was no work to be done in the plant at the time of his departure. Having regard to the broad tasks which are part of the position held by Mr. James, it is not credible that *all* of these tasks were fully completed at the time he departed. Nonetheless, it is clear that his departure was related to his concerns about the safety of the work place, and that he communicated these concerns to Mr. Burns at the time. His departure was clearly a “work refusal” as contemplated by section 43 of the Act.

13. In that regard, we feel it appropriate to comment briefly on some testimony offered by Mr. McCann. It was Mr. McCann’s testimony that a Workers’ Compensation Board investigator had told him subsequent to April 26, 1994 that Mr. James had a medical appointment on that date, and Mr. McCann speculated during the course of his evidence that Mr. James walked off the job to attend this appointment. This testimony was permitted over the objection of the applicant’s counsel, but we advised Mr. Wheeler that we would give the testimony the appropriate weight at the end of the hearing. Subsequently, neither the Workers’ Compensation Board doctor nor the investigator was called to provide direct evidence of the allegation. Mr. James specifically denied the truth of this allegation in his testimony. In this light, we give Mr. McCann’s testimony no weight.

Over and above the fact that it is hearsay evidence twice removed, to accept it implicitly require acceptance of the proposition that Mr. James purposely caused the accident so as to permit him to leave the workplace at a convenient time, a proposition that is simply implausible on the facts before us.

14. Later the afternoon of April 26, 1994, Mr. James called Mr. Burns and inquired about his position. There was some discussion regarding whether Mr. James had quit his job or had been fired, and Mr. James eventually made his way to the plant after working hours, and it was agreed with Mr. Burns at that time that Mr. James would return to his job the next day. According to Mr. James, on April 27, 1994 he helped Mr. Burns clean the mess created by the accident (and repair the racking), primarily by operating the reach truck in such a manner so as to permit Mr. Burns to step up onto the racking and to remove product which had become lodged in the racking. Mr. James stated that he agreed to help clean up the mess on the evening of April 26, 1994 during his conversation with Mr. Burns. Both Mr. Burns and Mr. James agreed that Mr. James spent most of his time on April 27, 1994 watching Mr. Burns clean the items on the racking, approximately 8 to 10 feet away from the racking. The clean up of the racking took approximately two hours, according to Mr. James, and thereafter he spent time cleaning up around the rack.

15. Mr. Burns' recollection of this event is somewhat similar to that of Mr. James. He recalls that Mr. James spent most of April 27, 1994 aiding him in his cleanup by way of raising Mr. Burns in the reach truck so as to clear product from the racking, and by observing the clean up from a distance. Mr. Burns conceded in testimony that Mr. James "wanted nothing to do with the racking".

16. The next incident of significance occurred on Friday, April 29, 1994. Mr. James was scheduled to meet with a doctor regarding his injury and had reminded Mr. Burns of this appointment on April 27, 1994. Mr. Burns conceded in testimony that two days notice was sufficient. It would appear to be common ground that Mr. James had scheduled only the morning of April 29 for the doctor's appointment, and had advised the employer that he would be attending at work by 12 noon that day. According to Mr. James, the doctor's appointment was delayed and, at approximately 11:30 to 11:45 a.m., he called Mr. Burns at MLG to advise that he would be late. In fact, he did return to the plant by 1:00 p.m., but was required to return to the hospital to see another doctor regarding a bone scan. It was the testimony of Mr. James that Mr. Burns told him that it was permissible for him to take the rest of the day and, in fact, he did, returning to the doctor's offices that afternoon. Mr. Burns believed that Mr. James' return to the plant was at 12:00 p.m., and testified that he told Mr. James that it didn't appear to him that this was a "final" examination as had been suggested earlier by Mr. James. Mr. Burns did not deny that he gave Mr. James permission to take the afternoon off to attend for the bone scan appointment. Mr. Burns testified that due to Mr. James' absence on this day, work began to "pile up" in the warehouse.

17. Further incidents which led to Mr. James' termination from employment occurred on Monday, May 2, 1994. Both Mr. McCann and Mr. Burns testified that they met for approximately 2 hours on May 2, 1994, from 8:00 a.m. to 10:00 a.m. Mr. Burns stated that the plant's "lack of productivity" while Mr. James had been employed was discussed at this meeting. Furthermore, Mr. Burns conceded that at this time he discussed Mr. James' "absences", and his possible discharge. Mr. McCann conceded that there was such a discussion on May 2, 1994, and testified that Mr. James' increased absenteeism on April 29, 1994 (the one-half day having increased to one full day) caused him concern "especially in light of the April 26, 1994 absence".

18. At 11:00 a.m. on Monday, May 2, 1994, Mr. James left the workplace and went home. The circumstances which led to this are fundamentally in dispute as between the parties. Mr.

James testified that on April 29, 1994, after his afternoon doctor's consultation, he made two further appointments - one for May 3, 1994 and one for May 11, 1994, and that he returned to the plant that afternoon to advise Mr. Burns. Mr. James stated that this was distressing to Mr. Burns. On May 2, 1994, shortly before 11:00 a.m., Mr. James determined an error on the appointment card which had been given to him - the date for the appointment was stated to be "Wednesday May 3, 1994", but May 3, 1994 was, in fact, a Tuesday. Accordingly, it became clear that the appointment could be on either the Tuesday or Wednesday. Mr. Burns was approached about this by Mr. James. According to Mr. James, Mr. Burns very deliberately sat him down in a chair, provided him with the phone, and told him to call the doctor's office. Once the doctor was contacted, it became clear that the appointment was for Wednesday, May 4, 1994, and was incorrectly noted on the card. Mr. James testified that this was distressing to Mr. Burns and that Mr. Burns told him to go home, and that he would call Mr. James regarding what would happen next. Mr. James was not called by Mr. Burns on the remainder of May 2, 1994.

19. Mr. Burns, on the other hand, was not of even mind regarding the events of this day. He stated that Mr. James started at 8:00 a.m. and, at 11:00 a.m., advised him that he had a cold and did not feel well. Mr. Burns stated that he offered aspirin to Mr. James, and an earlier break time, but that these were not accepted by Mr. James. According to Mr. Burns, he did not ask Mr. James to leave but, instead, told him that there was work to be done. Furthermore, according to Mr. Burns, it was not until May 2, 1994, that he was advised of Mr. James' medical appointment for May 4, 1994. In cross-examination, Mr. Burns stated that Mr. James told him of the confusion regarding the medical appointments at about 10:00 a.m., on May 2, 1994, having made a telephone call to his doctor on his break, and that it took approximately "five minutes" to do so. He could not recall the errant appointment card being brought to his attention.

20. The evidence of these two witnesses is in entire contradiction and is most troubling to the Board, because it is apparent that one of the two witnesses is not being fully frank in his testimony. Having regard to all the circumstances, we are of the view that the events of the day are, on the balance of probabilities, closer to those as described by the applicant. Counsel for the employer submitted in argument that it made little sense for Mr. Burns, already one day behind schedule due to Mr. James' absence on April 29, 1994, to send Mr. James home as a result of an error on the appointment card. Although there is some truth to that observation, it must be kept in mind that the incident regarding the "confusion" over the date of the medical appointment occurred almost immediately after the meeting between Mr. McCann and Mr. Burns in which Mr. James' productivity (and that of the operation) was discussed. It seems more probable to us that Mr. Burns, in light of the previous absences, became somewhat impatient with Mr. James and concluded at the time that Mr. James was not the type of employee that he wanted at MLG.

21. With respect to May 3, 1994, the evidence of the parties also diverges. According to Mr. Burns, he received a telephone call at approximately 10:30 a.m. from Mr. James' girlfriend, advising that Mr. James would not be in. According to Mr. Burns, no reason was given for the absence. After the workday had completed, Mr. James appeared at the premises and a discussion ensued, at which time Mr. Burns told Mr. James that he needed someone there every day, and could not visualize continued employment if further time was taken off. Mr. Burns testified that Mr. James agreed to cancel *all* of his appointments at that time.

22. Mr. James agrees that he met with Mr. Burns after hours, and discussed continued employment with MLG. However, he also states that he appeared for work that day at about 8:00 a.m., his normal scheduled starting time. He did not have the opportunity to sign in and met with Mr. Burns for 30-45 minutes. Mr. James states that he was never told he was being fired but Mr. Burns stated at that time that "he was not the one for the job". Mr. James states that he returned

after hours to get his final pay cheque and to return his uniform, asked for another chance and “ended up getting my job back”. Mr. James concurred with Mr. Burns’ recollection that he was to show up for work on May 4, 1994 and not go to his doctor’s appointment.

23. Once again the testimony of Messrs. Burns and James is diametrically opposed. We are of the view that the testimony of Mr. James makes most sense in the circumstances. We find it difficult to fathom why Mr. Burns did not raise with the telephone caller the reason or duration of Mr. James’ absence, or ask why it was not Mr. James who was calling, should a telephone call have been made. To simply accept the call on its face without inquiry is hard to accept, especially in light of the employer’s admitted concern regarding absences. In our view, it is more likely that Mr. James, having been told to go home on the prior day, and having received no call as had been suggested, attended for work the next day and was told to leave as he was not the “right person for the job”.

24. In any event, there is no dispute over what happened on May 4, 1994. Mr. James did not show up for work, as had been earlier agreed. Mr. James stated that, notwithstanding his agreement with Mr. Burns, he felt that it was important to attend at his doctor’s appointment. He testified that he did just that and appeared at the premises of MLG at approximately 9 to 9:30 a.m., between his two attendances before the doctor scheduled for that day. Mr. James stated that Mr. Burns acknowledged him only insofar as to say “see you later, good luck”. Mr. James acknowledged that he knew his job would be lost if he did not show up on time, but had concluded that his employer’s request that he cancel his appointments was unfair. Mr. Burns told the Board that, in light of Mr. James’ absence on May 4, 1994, he had to look for a new person to fill the job. This decision was made that same day, a search commenced at 12 noon that day, and a new shipper/receiver/packer was hired the next day. Mr. Burns testified that the decision to terminate Mr. James’ employment was based on his impression that he was getting “the runaround” from Mr. James, and that, along with his absenteeism, led him to conclude that he could not trust Mr. James.

25. It is on these facts that the Board must determine if section 50 of the Act has been violated. We note, in passing, that we entertained evidence regarding post-termination conduct of the parties (in particular, efforts made by Mr. James to obtain his last pay cheque) which may well have had some relevance to the issue of reinstatement should it have been requested by the applicant. As it developed, the applicant has now obtained full time employment with National Grocers and is not requesting reinstatement. Accordingly we will not recount the evidence regarding the post-termination conduct here. We do note, however, for the assistance of employer counsel, that contrary to his submission on the first day of hearing, whether or not the applicant is reinstated to employment is a decision for the Board to make and does not in any way depend upon whether his client “desires” or “is willing” to take the individual back to work.

Decision

26. We are of the view that this application must be successful. The employer has not satisfied us, on the balance of probabilities, that Mr. James’ health and safety activities were not at least part of the reason for his termination of employment.

27. There is no doubt that Mr. James did not show up for work on May 4, 1994 as was expected by the employer. Furthermore, it is also apparent that the doctor’s appointment for April 29, 1994 extended beyond the time anticipated by the employer. There is also no doubt, even on the basis of the testimony of Mr. James, that he committed some errors while employed by MLG. (The employer devoted a large part of its evidence to the weaknesses of Mr. James’ performance as it related to things such as excessive use of the telephone, poor driving of the reach truck and

pallet truck, and other related matters. Mr. Burns' notes of these events were identified by him to have been contemporaneously made and were admitted into evidence. Having reviewed them, we are *not* satisfied that the notes *were* all prepared contemporaneously.) Assuming, however, that all of these performance issues were important to MLG, and were in the forefront of the employer's decision to terminate employment, that in and of itself does not absolve the employer from liability, *if* the safety concerns of Mr. James were a factor. We have concluded that they were.

28. Our conclusions are supported by the testimony of both Mr. Burns and Mr. McCann. Although most of Mr. McCann's testimony was in the nature of hearsay (having been away from the business on many of the relevant days), both he and Mr. Burns testified to meeting on May 2, 1994, between 8:00 a.m. to 10:00 a.m. It should be kept in mind that, by the time of that meeting, Mr. James had missed time from work on April 26, 1994 (the date of the accident) and on April 29, 1994 (the previously-approved medical appointment of one-half day which was approved by Mr. Burns for extension to one whole day). The absence of April 29, 1994, was, in fact, paid for by the employer pursuant to the terms and conditions of Mr. James' employment which were made an exhibit to these proceedings.

29. Going back to the meeting of May 2, 1994 - and even taking Mr. Burns' testimony as accurate on its face - by the time of the meeting Mr. Burns was unaware of the medical appointments scheduled for the week of May 2, 1994, nor of the administrative error reflected by the appointment card. Yet, Mr. Burns stated that, at that meeting, he and Mr. McCann discussed Mr. James' "absences" and his possible discharge. It seems entirely incredible to us that such a discussion could focus *solely* on the absence of April 29, 1994 - an approved absence - and we must therefore conclude that the absence of April 26, 1994 was also an "absence" which concerned the employer and which was part of the discussion that day. That this was so was confirmed by Mr. McCann who stated that Mr. James' absence on April 29, 1994 was troubling "especially in light of the April 26, 1994 absence". As it was Mr. Burns who ultimately decided to terminate Mr. James' employment, and as that decision followed the meeting with Mr. McCann by 2 days and was based, in part, on Mr. James' absences, we are of the view that Mr. James' early departure on April 26, 1994 was a factor in the decision to terminate his employment. As Mr. James' departure on that date was integrally related to his work refusal of that same date, we find that Mr. James' termination of employment occurred, in part, "because [he] has acted in compliance with [the] Act", in particular s.43 of the Act, all of which is contrary to s.50 of the Act.

Remedy

30. The evidence before the Board established that Mr. James sought alternate work after his termination from employment by MLG on May 4, 1994. He was unemployed until June 21, 1994. This equates to 7 weeks less one day. Mr. James was paid \$9 per hour for a 40 hour week for a total of \$360 per week (\$72 per day). His total damages as a result of the employer's breach of the Act are therefore \$2448.00. We hereby order the employer to pay to the applicant the sum of \$2448.00 as damages for breach of the Act. Interest on this sum shall be payable in accordance with the formula contained in *Hallowell House Limited* [1980] OLRB Rep. Jan.35.

31. We will remain seized of this matter should there be any difficulty in effecting the remedy ordered.

DECISION OF BOARD MEMBER W. A. CORRELL; November 28, 1994

1. I do not agree with the conclusions of the majority award. There was ample evidence to

show that the employer had good and sufficient cause to terminate Mr. James' employment. The complainant was employed for a total of 15 days and during that short time was absent from work on several occasions. This experience of absenteeism occurred in a workplace where there was a great deal of work to be handled by only two warehouse people, the complainant and his supervisor, Mr. Burns.

2. Despite the fact that he was a probationary employee, Mr. James showed no dedication to his employer or concern for the work-place problems that his absenteeism was causing. Mr. James was not terminated because he made a complaint under the Act following an accident. He was in fact allowed to leave the work he was doing at the time of the accident and given other work to perform away from the area he complained about. He worked on that work assignment for only a few hours and left it and the plant without permission.

3. On five separate occasions he was absent for periods of several hours up to a full day. However, under what circumstances, with or without permission, part of a day or a whole day is not the point. It is on these points that the parties are in conflict and their testimony is contradictory. These matters of disagreement are used by the complainant as a smoke screen to obscure the simple fact that Mr. James's attitude towards his employment lead his employer to the conclusion that he was not a desirable or reliable worker. In total there were five days of full or partial absence out of the 15 possible work days involved. We cannot ignore the fact that Mr. James was seeking to be employed full-time at his former workplace. His interest it would appear to his employment at this workplace was secondary at least or more probably remote.

4. The complainant's refusal to work in the area of the racks where the accident occurred was accepted by management. He was assigned other work in another area far removed from the accident scene. He was not sent home or disciplined in any way. He was discharged at a later date because he was an unreliable worker. His demeanour following the termination is important to note in that he returned for his pay cheque and acted in a very belligerent manner. He tried to intimidate (on his own admission kicking a door) and showing an aggressive attitude towards both members of management. These are hardly the actions of a reasonable person. These actions reflect on both his temperament and attitude toward the job and to management concerns. They add a perspective to the veracity of his testimony and reinforce the fact that his main concern was for his own self-interest.

5. In my opinion management had ample reason to terminate Mr. James' employment. The fact that there was an accident does not explain away his behaviour and attitude towards his job or the consequences that would follow. Other work was offered on the day of the accident indicating that the employer made every effort to comply with the Act. If anything, his refusal to continue with such work indicates that Mr. James was not complying with his obligations. He gave no reasonable explanation for that.

6. In this case the Board cannot find the employer in violation. That would mean, in my opinion, that an employer could not discipline an employee in any way after an accident had occurred involving an employee whose conduct at the workplace was unacceptable for other unrelated reasons.

7. In my opinion, the termination of Mr. James should be upheld.

8. In the award of remedy made by the majority, I would object that we cannot rule on precise amounts of compensation without some clear evidence regarding mitigation through other compensation that might have been received. In most decisions by this Board the matter of financial remedy is left to negotiation between the parties. In this case in particular, there is evidence

that the applicant was in the care of the W.C.B for the whole period of employment and most likely received compensation for such days. In the alternative he would likely have been seeking U.I.C. benefits. More substantial evidence is needed before this Board commits an order of so specific a financial remedy.

2490-94-M Marriott Corporation of Canada, Applicant v. Ontario Public Service Employees Union, Ontario Public Service Employees Union, Local 241, Responding Party v. Mohawk College of Applied Arts and Technology, Intervenor

Strike - Strike Replacement Workers - Employer applying under section 73.2(12) of the Act for determination that specified replacement workers necessary to prevent danger to life, health and safety in connection with anticipated strike of its cleaning employees - Company normally employing 28 full-time and two part-time cleaners at work site and having four managerial employees available to perform bargaining unit work in event of strike - Board finding that employer having sufficient managerial personnel to perform cleaning necessary to prevent danger to life, health and safety and that additional assistance in form of specified replacement workers not necessary - Application dismissed

BEFORE: *Judith McCormack*, Chair, and Board Members *S. C. Laing* and *K. Davies*.

APPEARANCES: *John Barrack*, *David Smith*, *Tom Mitchener* and *Sandra Wilson* for the applicant; *S. B. D. Wahl*, *E. Brennan*, *April Schaap* and *Daniel Ahana* for the responding party; *Dolores Barbini*, *Zaki Ullah*, *Ron Baskin* and *Kent Turdry* for the intervenor.

DECISION OF JUDITH MCCORMACK, CHAIR, AND BOARD MEMBER K. DAVIES;
November 29, 1994

1. This is an application for determinations with respect to the use of replacement workers under section 73.2(12) of the *Labour Relations Act*. The applicant company, Marriott Corporation of Canada ("Marriott") takes the position that specified replacement workers are necessary to prevent danger to life, health and safety under section 73.2(3) in connection with an anticipated strike of its employees. The responding union, the Ontario Public Service Employees Union, Local 241 ("OPSEU") opposes this application.

2. Marriott operates a cleaning company which provides services to the intervenor, Mohawk College of Applied Arts and Technology ("Mohawk"), a community college in the Hamilton area. Prior to 1979, Mohawk used its own employees who were covered by a support staff collective agreement with OPSEU to clean the college. After a strike in 1979, cleaning services were contracted out and Marriott has held the contract in this regard for the last nine years. OPSEU has represented Marriott employees assigned to Mohawk since January of 1991.

3. There are 28 full-time and two part-time employees of Marriott who clean the Fennell and Wentworth campuses of Mohawk. The most recent collective agreement between Marriott and OPSEU expired on June 1, 1994. The parties entered into negotiations for a renewal agreement in June of this year, and conciliation meetings were held on September 22, 1994 and October 7, 1994.

At the latter meeting, Marriott tabled its final offer and a no-board report was issued on October 11, 1994. Three days later, employees voted to reject Marriott's final offer and authorized a strike by a majority of 93%. OPSEU then advised Marriott in writing that a strike would commence at 12:01 a.m. on October 31, 1994. There was no dispute that sections 73.1 and 73.2 applied in these circumstances.

4. The strike deadline was extended by the union to 11:00 p.m. on October 31st for the purpose of allowing the Board an opportunity to complete the hearings on Marriott's application and to issue a decision in this regard. In the afternoon of October 31st, the Registrar advised parties by facsimile transmission that the Board had unanimously endorsed the record as follows:

Having carefully considered the evidence and submissions of the parties, and on the basis that there are the equivalent of four managerial personnel entitled and able to perform the work of employees in the bargaining unit in accordance with the union's acknowledgement, we find that specified replacement workers are not necessary to enable the employer to prevent danger to life, health and safety. Our reasons will follow.

We now provide our reasons.

5. Sections 73.1 and 73.2 read as follows:

73.1- (1) In this section,

"employer" means the employer whose employees are locked out or are on strike and includes an employers' organization or person acting on behalf of either of them;

"person" includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor;

"place of operations in respect of which the strike or lock-out is taking place" includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work.

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
2. The work of an employee in the bargaining unit that is on strike or is locked out.
3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1(3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

73.2-(1) In this section, "specified replacement worker" means a person who is described in subsection 73.1 (5) or (6) as one who must not be used to perform the work described in paragraphs 2 and 3 of sub-section 73.1(5).

(2) Despite section 73.1, specified replacement workers may be used in the circumstances described in this section to perform the work of employees in the bargaining unit that is on strike or is locked out but only to the extent necessary to enable the employer to provide the following services:

1. Secure custody, open custody or the temporary detention of persons under a law of Canada or of the Province of Ontario or under a court order or warrant.
2. Residential care for persons with behavioural or emotional problems or with a physical, mental or developmental handicap.
3. Residential care for children who are in need of protection as described in subsection 37(2) of the *Child and Family Services Act*.
4. Services provided to persons described in paragraph 2 or 3 to assist them to live outside a residential care facility.
5. Emergency shelter or crisis intervention services to persons described in paragraph 2 or 3.
6. Emergency shelter or crisis intervention services to victims of violence.
7. Emergency services relating to the investigation of allegations that a child may be in need of protection as described in subsection 37(2) of the *Child and Family Services Act*.
8. Emergency dispatch communication services, ambulance services or a first aid clinic or station.

(3) Despite section 73.1, specified replacement workers may also be used in the circumstances described in this section to perform the work of employees in the bargaining unit that is on strike or is locked out but only to the extent necessary to enable the employer to prevent,

- (a) danger to life, health or safety;
- (b) the destruction or serious deterioration of machinery, equipment or premises; or
- (c) serious environmental damage.

(4) An employer shall notify the trade union if the employer wishes to use the services of specified replacement workers to perform the work described in subsection (2) or (3) and shall give particulars of the type of work, level of service and number of specified replacement workers the employer wishes to use.

(5) The employer may notify the trade union at any time during bargaining but, in any event, shall do so promptly after a conciliation officer is appointed.

(6) In an emergency or in circumstances which could not reasonably have been foreseen, the employer shall notify the trade union as soon as possible after determining that he, she or it wishes to use the services of specified replacement workers.

(7) After receiving the employer's notice, the trade union may consent to the use of bargaining unit employees instead of specified replacement workers to perform some or all of the proposed work and shall promptly notify the employer as to whether it gives its consent.

(8) The employer shall use bargaining unit employees to perform the proposed work to the extent that the trade union has given its consent and if the employees are willing and able to do so.

(9) Unless the parties agree otherwise, the terms and conditions of employment and any rights, privileges or duties of the employer, the trade union or the employees in effect before it became lawful for the trade union to strike or the employer to lock out continue to apply with respect to bargaining unit employees who perform work under subsection (8) while they perform the work.

(10) No employer, employers' organization or person acting on behalf of either shall use a specified replacement worker to perform the work described in subsection (2) or (3) unless,

- (a) the employer has notified the trade union that he, she or it wishes to do so;
- (b) the employer has given the trade union reasonable opportunity to consent to the use of bargaining unit employees instead of the specified replacement worker to perform the proposed work; and
- (c) the trade union has not given its consent to the use of bargaining unit employees.

(11) In an emergency, the employer may use a specified replacement worker to perform the work described in subsection (2) or (3) for the period of time required to give notice to the trade union and determine whether the trade union gives its consent to the use of bargaining unit employees.

(12) On application by the employer or trade union, the Board may,

- (a) determine, during a strike or a lock-out, whether the circumstances described in subsection (2) or (3) exist and determine the manner and extent to which the employer may use specified replacement workers to perform the work described in those subsections;
- (b) determine whether the circumstances described in subsection (2) or (3) would exist if a strike or lock-out were to occur and determine the manner and extent to which the employer may use specified replacement workers to perform the work described in those subsections;
- (c) give such other directions as the Board considers appropriate.

(13) On a further application by either party, the Board may modify any determination or direction in view of a change in circumstances.

(14) The Board may defer considering an application under subsection (12) or (12) until such time as it considers appropriate.

(15) In an application or a complaint relating to this section, the burden of proof that the circumstances described in subsection (2) or (3) exist lies upon the party alleging that they do.

(16) The employer and the trade union may enter into an agreement governing the use, in the event of a strike or lock-out, of striking or locked-out employees and of specified replacement workers to perform the work described in subsection (2) or (3).

(17) An agreement under subsection (16) must be in writing and must be signed by the parties or their representatives.

(18) An agreement under subsection (16) may provide that any of subsections (4) to (10) do not apply.

(19) An agreement under subsection (16) expires not later than the earlier of,

- (a) the end of the first strike described in subsection 73.1 (2) or lock-out that ends after the parties have entered into the agreement; or

(b) the day on which the parties next make or renew a collective agreement.

(20) The parties shall not, as a condition of ending a strike or lock-out, enter into an agreement governing the use of specified replacement workers or of bargaining unit employees in any future strike or lock-out. Any such agreement is void.

(21) On application by the employer or trade union, the Board may enforce an agreement under subsection (16) and may amend it and make such other orders as it considers appropriate in the circumstances.

(22) A party to a decision of the Board made under this section may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

(emphasis added)

6. The Board described these provisions in general terms in *The Canadian Red Cross Society*, [1994] OLRB Rep. Jan. 34:

41. Section 73.1 sets out various kinds of prohibitions with respect to the performance of work during a strike. Those prohibitions relate to the type of person or employee involved, the nature of the work, the location of the work, reprisals, and certain conditions and definitions. Section 73.2 then provides exceptions to those prohibitions, various procedures and rights with respect to the performance of work in those exceptional conditions, a mechanism for agreement and provisions for directions and enforcement.

42. It is clear that these sections do not purport to ban the performance of the work of striking employees absolutely. For example, in addition to the named exceptions set out in section 73.2, the structure of section 73.1 permits the use of certain types of persons either explicitly or by omission. At the same time, however, it is also apparent that the prohibitions are very comprehensive in scope, particularly in the case of work performed at the strike location.

In the same case, the Board also commented on the purpose of these provisions:

37. There was a considerable degree of consensus between the parties with respect to the overall legislative intent of these sections. It is apparent that they are not “motive” provisions in the sense that anti-union animus or some specific kind of intent is required. Like section 81 which provides for a statutory freeze, an anti-union intent may be relevant, but not necessary. In contrast, for example, section 72(2) defines a “professional strike-breaker” as someone whose primary object is to interfere with, obstruct, prevent, restrain or disrupt the exercise of rights in connection with a strike or lockout, and provides that “strike-related misconduct” has a similar motive-oriented meaning.

38. We adopt the submissions of several of the responding parties to the effect that the purpose of these amendments is to preserve the integrity and effectiveness of the strike as an economic weapon and to provide countervailing economic power to employees. In addition, both the unions and several of the responding parties referred us to material related to the legislative process which indicated that in a more general sense, the Legislature intended these provisions to reduce industrial conflict, facilitate the entry of women, part-time and other marginalized employment groups into collective bargaining, and encourage compromise.

7. Similarly, in *Famous Players Inc.*, [1993] OLRB Rep. Dec. 1270, the Board made these observations with respect to the purpose of section 73.1 in more specific terms:

42. The purpose of section 73.1 is to inhibit a struck employer’s ability to carry on business. The Legislature has decided that it is appropriate to enhance the union’s power to wage a successful strike, by limiting the means open to an employer to resist. When bargaining unit members withdraw their labour, the employer is prohibited from drawing upon specified pools of replacement labour (bargaining unit members who don’t support the strike and may wish to work, employees from other locations, managers from other locations, transferees after the notice to

bargain is given, the employees of a subcontractor, volunteers, etc.). Section 73.1 is not confined to “strike breakers” in the traditional sense. It encompasses a wide variety of potential sources of substitute labour. It is substitute labour or “replacement workers” that is the focus of the section, and it is in that light that one must consider the concept of bargaining unit work: the Statute prohibits employers from using replacement workers to get the strikers’ job done.

8. The first case in which the Board addressed section 73.2(3) in particular was *Labatt’s Ontario Breweries*, [1994] OLRB Rep. June 704 where the Board noted as follows:

14. Section 73.2(3) makes it clear that while the Legislature has decided to enhance the ability of employees to wage a successful strike, it has also imposed limitations to avoid giving rise to certain kinds of hazards. The use of specified replacement workers is permitted to prevent danger to life, health or safety, the destruction of serious deterioration of machinery, equipment or premises, or serious environmental damage. However, specified replacement workers are allowed in these circumstances “only to the extent necessary to enable the employer to prevent” the described hazards.

9. With this context in mind, we turn to the case before us. Marriott identified five different areas in which it asserted that cleaning services were necessary during a strike to prevent a danger to life, health and safety: the washrooms, the kitchen areas, the childcare centres, garbage collection and emergency services. We heard extensive evidence about the work involved in each of these areas and the minimum standards of cleanliness required, which we find unnecessary to recite in detail. Suffice it to say that we were convinced that should Mohawk continue to operate at full capacity during a strike, some cleaning would be required to prevent the build-up of bacteria and parasites and the attendant risk of communicable and other diseases, to reduce the attraction of vermin and to minimize slipping and falling hazards.

10. However, the union argued among other things that it was not necessary for Mohawk to operate during the strike. Counsel asserted that closing the school could not be considered to result in any danger to life, health or safety, since the school closed regularly during vacation periods. In this regard, counsel relied upon *Province of New Brunswick and C.U.P.E., New Brunswick Council of School Board Unions* (1979), [1980] N.B.L.L.C., Part 2, 14011 (P.S.L.R.B.) where the New Brunswick Public Service Labour Relations Board found that it would be necessary to maintain heat and a degree of sanitation services if schools operated during a strike. Nevertheless, it declined to designate employees normally performing this work as “necessary in the interest of the health, safety or security of the public” because the schools could be closed without resulting in health, safety or security problems.

11. Alternatively, counsel asserted that those of Marriott’s managerial personnel legally entitled to work during the strike were sufficient to perform any cleaning. He also argued that the necessity for cleaning at Mohawk could be reduced or eliminated by the closure of certain services or areas such as the pub, the cafeterias, the childcare centres and the tennis club. In any event, the union took the position that Mohawk employees could perform the work, citing *Modern Building Cleaning Inc.* (not yet reported, Board File 4471-93-U, October 7, 1994) [now reported at [1994] OLRB Rep. Oct. 1390], so that specified replacement workers were unnecessary.

12. In response, Marriott was of the view that it had no control over whether Mohawk continued to operate during a strike or closed down any areas. Among other things, counsel also argued that the Board could not look beyond the relationship between Marriott and its employees in assessing whether specified replacement workers were necessary to prevent danger to life, health and safety, and thus the availability of Mohawk employees was irrelevant. On its own, Marriott asserted that it did not have sufficient managerial personnel to perform what it considered to be the minimum amount of cleaning necessary. Mohawk in turn indicated that its intention was to

continue to operate during any strike, and that it supported Marriott's request for specified replacement workers.

13. The Board made these observations about similar arguments in *Labatt's, supra*:

19. It is also difficult to infer from the language of these sections any general assumption that an employer is entitled to operate during a labour dispute. On the contrary, the very comprehensiveness of the prohibitions in section 73.1 suggests that in many cases, operations will be brought to a temporary standstill. And if the purpose of section 73.1 is to inhibit a struck employer's ability to carry on business, one can hardly say that ceasing production is not contemplated by these provisions.

20. On the other hand, we share the company's views that these sections do not give rise to any general assumption that a struck employer should not be able to operate, as long as it can do so without contravening the statute. Indeed, the fact that section 73.1 allows the use of some persons in specific circumstances suggests that an employer may well attempt to continue operations, and section 73.2(2) makes this explicit in certain situations.

21. In other words, it is difficult to divine from these provisions an underlying or general assumption with respect to either continuing or ceasing production. As a result, we find it more fruitful to focus on the specific language of the relevant sections.

22. Section 73.2(15), which places the burden of proof on the party alleging that the circumstances described in section 73.2(3) exist, provides a good starting point for our analysis. The functional effect in this case is that the company must establish that specified replacement workers are necessary to prevent the enumerated hazards from arising. Section 73.2(3) then provides that specified replacement workers may be used "but only to the extent *necessary* to enable the employer to prevent [those circumstances]". This lends some support to the union's position. If the company can prevent the hazards from arising by means other than the use of specified replacement workers, it may find it more onerous to establish that such workers are "necessary" as a practical matter. This phrase also reflects a quantitative assessment; that is, that even where specified replacement workers are necessary, they can only be used *to the extent* necessary to prevent the listed circumstances and no more. The result is that the language suggests both that if there are other means available for preventing the hazards, an employer may not be able to establish that specified replacement workers are necessary, and that where it can do so, the remedy permitted will be closely tailored to the specific hazards to avoid the possibility of abuse.

23. This sheds at least some light on the parties' arguments. If a party alleges that specified replacement workers are necessary on the basis of maintaining a certain course of conduct, that party may also have to establish that such course of conduct is necessary within the meaning of section 73.2(3) as well. Otherwise a party could indeed structure circumstances in a manner which gives rise to the conditions set out in section 73.2(3) and then claim the exemption. This would not be consistent with the purpose of these provisions, which the Board noted in *Famous Players, supra*, "prohibits employers from using replacement workers to get the strikers' job done".

24. At the same time, there is no doubt that if the enumerated dangers or damage will arise, the section entitles an employer to relief. And although the language indicates that an applicant must establish that specified replacement workers are in fact necessary, the extent to which an employer must go in expending other means before coming to the Board for a remedy is not particularly clear. Even if we accept, as we do, that the intent of sections 73.1 and 73.2 is to enhance the impact of the strike sanction, there are areas in which the degree of that enhancement is not spelled out. This has implications not only for whether specified replacement workers are required under section 73.2(3) but how many and in what manner they will be used as well.

14. Marriott did not cite any danger to life, health or safety to its own employees or to itself in this application. Rather, it relied upon hazards affecting a third party, that is, its customer,

Mohawk and Mohawk's staff, students and faculty. There is nothing in the language of section 73.2(3) which suggests that an applicant cannot rely on danger to a third party in this manner. Indeed, the references to serious environmental damage and danger to life, health and safety have a public interest flavour which implies otherwise. On the other hand, where an applicant seeks to rely on danger to a third party, in considering whether such workers are necessary the Board may look to the ability of that third party to ameliorate or absorb those hazards and the resources available to it in this regard. We would also add that we have some difficulty with the proposition that specified replacement workers are required for the ultimate purpose of continuing a service or operation during a strike which is clearly not necessary to prevent a danger to life, health or safety such as a pub or a tennis club, to use the more obvious examples.

15. In the case before us, however, we were not required to decide these issues because we concluded that even if Mohawk continued to operate at full capacity, Marriott had sufficient managerial personnel to perform the cleaning necessary to prevent danger to life, health or safety within the meaning of section 73.2(3). Our conclusion in this regard was based on a number of factors. Firstly, we accepted Marriott's figures for the minimum number of employee hours necessary to clean the childcare centres and the kitchen areas as they were not disputed by OPSEU. We also assumed, without finding, that it was necessary to keep all eighty washrooms open and that the washrooms must be cleaned once a day, as asserted by Marriott. As a result of our assumptions in this regard, it was not necessary to embark on the exercise of attempting to assess the usage rate and patterns of students, staff and faculty, nor to determine the minimum number of washrooms required for them. In addition, we concluded on the evidence that the time it took to clean a washroom on average was between that set out in Marriott's evidence and that testified to by OPSEU witnesses. We also took into account the fact that some of the washrooms would require more time to clean than the usual nightly cleaning, since they were only being serviced once a day.

16. Secondly, we assumed, again without finding, that it was necessary to collect the garbage at least once a day at both campuses. We concluded on the evidence that more frequent garbage collection was not required, as the consequences were related to aesthetic concerns rather than health and safety problems. In considering the number of employee hours necessary to perform this work, we relied on the evidence with respect to Benjamin Escandor's duties, but increased that time to include the areas such as the student centre and the Wentworth campus which he does not service. We also took into account the fact that if garbage collection was performed only once a day, there would be considerably more garbage to collect, and that this function would be more time-consuming than where there were supplementary garbage runs as well.

17. Thirdly, we were prepared to assume without finding that it was necessary to provide emergency services with respect to broken glass, spills, unplugging clogged toilets, and so forth. However, we concluded that it was not necessary to provide what the parties described as "policing" with respect to cleaning or supplying washrooms more than once a day or other more cosmetic cleaning. In evaluating how many employee hours were necessary for the provision of emergency services, we relied upon a combination of the evidence of Ms. Schaap and Ms. Wilson in regard to the nature and frequency of events requiring such services.

18. Fourthly, Marriott's acknowledgement that cleaning services were not necessary within the meaning of section 73.2(3) between 7:00 a.m. Friday and 11:00 p.m. Sunday of each week played a role in our decision.

19. With these factors in mind, our review of the parties' evidence and submissions indicated that even if Mohawk operated to full capacity, the cleaning which we either concluded or

were prepared to assume in Marriott's favour was required by section 73.2(3) could be accomplished by approximately 214 employee hours per week.

20. Marriott asserted that it employed three managerial personnel who could perform bargaining unit work in accordance with the replacement worker provisions of the *Labour Relations Act*, and this was not disputed by OPSEU. In addition, the parties agreed as a fact that there was a fourth managerial employee who could not perform any work at the Fennell and Wentworth campuses due to an undisputed disability. As a result, OPSEU agreed to allow Marriott to substitute a person who could fully perform the bargaining unit work for this fourth individual. We therefore found that there were four managerial employees available to Marriott to perform bargaining unit work. Consequently, if each of these employees worked 53.5 hours per week during the anticipated strike, the cleaning described above could be provided.

21. Assuming that this schedule would represent an increase in the usual work time of these employees, we note the Board's observations in *Labatt's, supra*, that it is "not uncommon for managerial employees to work harder during a strike; this is part of the pressure economic sanctions exert which the theory of collective bargaining presumes will encourage settlement". Of course, this does not mean that managerial employees are required to work an unlimited number of hours before the Board will find specified replacement workers necessary under section 73.2(3). In this case, however, it is not apparent that working 53.5 hours per week would be so exhausting as to in itself create a situation which would fall within the parameters of section 73.2(3). We therefore concluded that additional assistance in the form of specified replacement workers was not necessary within the meaning of that provision.

22. One final caveat; we have used a rough calculation of employee hours to come to our conclusion in this case because that approach was appropriate on the evidence and submissions before us. This does not necessarily mean that such an approach will always be applicable.

23. This application is dismissed.

DECISION OF BOARD MEMBER S. C. LAING; November 29, 1994

1. The decision in this case is premised solely on an analysis of the work to be performed, and the resources available to Marriott to complete that work should a strike of its employees occur.

2. It is not necessary, in this case, for the Board to determine in what, if any, circumstances it may examine the ability of a third party to bear the responsibility of preventing dangers to life, health or safety, in place of affording the struck employer strike replacement workers.

3. Nor it is necessary to decide whether the nature of the service or operation (i.e. pub or tennis club) is relevant when assessing the need for strike replacement workers.

4. Accordingly, comments from the Board relative to those issues are properly left for another day, when they are central to its conclusions.

1047-94-G Labourers' International Union of North America, Local 183, Applicant v. **Metropolitan Toronto Apartment Builders' Association**, Responding Party

Certification - Trade Union - Board dismissing earlier certification application on ground that employer's employees not eligible for membership under applicant's constitution - Union making subsequent application - Board finding that amendments to applicant's constitution effective to cure defect regarding restriction on membership

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *M. M. Vukobrat* and *J. Redshaw*.

APPEARANCES: *L. A. Richmond*, *M. J. Reilly*, *A. Dionisio* and *R. Lotito* for the applicant; *Joseph Liberman* and *Richard Lyall* for the responding party.

DECISION OF THE BOARD; November 4, 1994

I

1. This is an application brought pursuant to the provisions of section 126 of the *Labour Relations Act*, in which the applicant L.I.U.N.A., Local 183 (hereinafter, "Labourers 183" or the "Labourers") allege that the Metropolitan Toronto Apartment Builders' Association (hereinafter, "MTABA") has breached the collective agreement. The particular clause in question is found in an attached Letter of Understanding and it requires that the MTABA only subcontract bricklaying to companies in contractual relations with Bricklayers Local 1 or Labourers' 183, provided however, that "the formation of a common Union of Local 183 and Local 1 must take place before December 31, 1993, failing which such provision will expire as of that date." The parties later extended the deadline to April 30, 1994.

2. A hearing was held into this matter on September 28th and 29th, 1994, and the Board issued a short "bottom-line" decision on October 3, 1994. By majority decision, Board Member Redshaw reserving, the Board was satisfied that no "common Union" was formed by April 30, 1994 within the meaning of the Letter of Understanding, and accordingly, the subcontracting clause, insofar as it dealt with bricklaying, was of no force and effect after April 30, 1994. We provide our reasons for that decision. Mr. Redshaw now concurs.

3. There was one preliminary matter dealt with by the Board. Several parties sought intervenor status, essentially on the basis that their ability to continue to work in the industry would be directly affected if the Board should conclude that the subcontracting clause in question was still in effect. The Board ruled that standing would not be granted to any of the three parties seeking such status.

4. This case involves the interpretation of a subcontracting clause, which appears in the collective agreement between Labourers' 183 and the MTABA. The parties seeking to intervene might benefit commercially if the subcontracting clause is found to have expired. However, they are not parties to or bound by the collective agreement, nor did any of them participate in its negotiation. They are strangers to the contractual relationship at issue and the subject of this proceeding. Their interest is purely commercial — the interpretation of the clause may effect their business opportunities. This does not entitle them to the right to intervene.

5. They were not entitled as of right to participate, and the Board was not satisfied that there was good reason to nevertheless allow them to participate. All sub-contracting clauses potentially affect other players in the industry in a negative fashion. That is the purpose of these clauses.

The fact that a subcontracting clause was at issue here did not justify granting standing to the parties so seeking and the Board so ruled. At the same time, we indicated that our ruling did not affect any rights the parties might have to bring or participate in a jurisdictional dispute, if one arose, or to raise concerns they might have with respect to ICI bargaining rights, if an issue arose in the ICI sector and became manifest.

6. In the result, the case proceeded with only the participation of Labourers' 183 and the MTABA.

II

7. The facts were not in dispute. The Board heard the evidence of two witnesses.

8. Negotiations between Labourers' 183 and the MTABA for the renewal of their collective agreement began around February, 1992, and continued into the spring. Labourers' 183 wanted to obtain subcontracting protection over bricklaying, and proposed this amendment. The MTABA was not initially prepared to agree to such a term.

9. Ultimately, the parties agreed that the collective agreement would contain a "no subcontracting" clause with respect to bricklaying (amongst other trades or types of work not here in issue), but their agreement to this clause was predicated upon the requirement that the MTABA would only have to deal with Labourers' 183 in the future. The MTABA was aware during negotiations that Labourers' 183 and Bricklayers Local 1 had been developing an association, and the MTABA wanted assurances that it would only have to deal in the future with Labourers' 183.

10. It received these assurances. In essence, the parties agreed that Labourers' 183 would take over Bricklayers Local 1, so that Bricklayers Local 1 would cease to exist insofar as the MTABA and matters covered by its agreement with Labourers' 183 were concerned. Indeed, the parties specifically discussed the concept of Labourers' 183 and Bricklayers Local 1 forming a merger, with the result that Labourers' 183 would have effectively taken over Bricklayers Local 1.

11. On this basis, the MTABA agreed to a subcontracting clause for bricklaying requiring it to subcontract only to companies with agreements with Labourers' 183 or Bricklayers Local 1, from February 1, 1993 until December 31, 1993. By this latter date, Labourers' 183 was required to have taken over Bricklayers Local 1, failing which the subcontracting clause would automatically terminate.

12. This arrangement was to be reflected in a Letter of Understanding attached to the collective agreement. Before this Letter was drawn up and signed, counsel for the MTABA received a phone call from counsel for Labourers' 183. Union counsel indicated that Labourers' 183 was not sure how it would accomplish the taking over of Bricklayers Local 1 by December 31, 1993. The union was not confident that a merger was the appropriate mechanism.

13. Because of this uncertainty over the mechanism, the MTABA agreed with the Labourers that the text of the Letter of Understanding would not contain the word "merger", as had been agreed previously, but would use the term "common Union". Counsel did not discuss what this phrase might mean, but it was intended to provide some flexibility to Labourers' 183 in terms of how it might accomplish taking over Bricklayers Local 1. Thereafter, the Letter of Understanding was drawn up and signed, and it read (in this respect) that "the formation of a common Union of Local 183 and Local 1 must take place before December 31, 1993, failing which such provision will expire as of that date."

14. We jump ahead to late November and December, 1993. Both Bricklayers Local 1 and Labourers' 183 had meetings of their respective members, for the purpose of trying to meet the condition that they form a "common Union". Both unions made significant and time consuming efforts to comply with this requirement in the Letter of Understanding. The method they adopted was for the two unions to form a "certified counsel of trade unions", with Labourers' 183 and its officers constitutionally and practically having the dominant role in all meaningful aspects of the new Council.

15. To this end, Bricklayers Local 1 amended its constitution, to specifically authorize a merger, amalgamation or transfer of jurisdiction to any other trade union or council of trade unions. It also passed numerous motions. One authorized it to become a member of the Masonry Council of Unions Toronto and Vicinity (hereinafter "MCUTV"), a newly created council of trade unions comprised solely of Bricklayers Local 1 and Labourers' 183. Other motions appointed MCUTV as agent and representative for Bricklayers Local 1 in respect of all bargaining rights held by Bricklayers Local 1 in the residential sector of the construction industry, and authorized the MCUTV to bargain on behalf of members of Bricklayers Local 1 and to administer and enforce all collective agreements of Bricklayers Local 1 in the residential masonry sector of the construction industry, including the making of applications for certification before the Ontario Labour Relations Board on behalf of members of Bricklayers Local 1 in the residential sector of the construction industry.

16. Labourers' 183 also took the requisite steps to set up and authorize MCUTV.

17. On December 20, 1993, the MCUTV constitution was approved and adopted. Under that constitution, the Executive Board of MCUTV was to be comprised of five persons, including the Business Manager of Labourers' 183 and the Secretary-Treasurer of Bricklayers Local 1. Of the remaining three Executive Board Members, two were to be appointed by Labourers' 183. A quorum of the Executive Board consisted of three members, two of whom had to be members appointed by Labourers' 183.

18. The Business Manager of the MCUTV is, under the constitution, the Business Manager of Labourers' 183. The Business Manager has the right to delegate his authority to another Board Member, provided that the delegation is to a member of Labourers' 183. Effectively, Labourers' 183 personnel do dominate MCUTV, as intended by the two unions.

19. The constitution indicates that MCUTV is currently composed of Labourers' 183 and Bricklayers Local 1. Although a union can withdraw from membership in the Council, such withdrawal can only be effective sixty days prior to the expiry date of the collective agreement to which the Council was agent or party. Upon withdrawal by any of the member unions, the Council would be dissolved, and the bargaining rights would remit back to entities that had them prior to the establishment of the Council.

20. The Letter of Understanding required that a "common Union" be formed by Labourers' 183 and Bricklayers Local 1 by December 31, 1993. The MCUTV was formed in late December, 1993. In early January, 1994, Labourers' 183 wrote to the MTABA, indicating that it had formed a "common Union" by the deadline, and advising that it would continue to rely upon and insist upon the subcontracting clause. The MTABA took the position that a "common Union" had not been formed, and that the subcontracting clause covering bricklaying had expired.

21. The parties continued to disagree. In February, 1994, the parties signed a Memorandum of Agreement by which they agreed to extend the deadline for the formation of a "common Union" from December 31, 1993 to April 30, 1994, and by which it was agreed that Labourers' 183

would not enforce the subcontracting clause (with respect to bricklaying) between January 1, 1994 and April 30, 1994.

22. On April 27, 1994, the Board (differently constituted) issued a decision certifying the MCUTV as a "certified council of trade unions". Section 1(1) of the *Labour Relations Act* defines the term "trade union", and that definition includes a "certified council of trade unions".

23. The issue is easy to define. Did Labourers' 183 and Bricklayers Local 1 form a "common Union" by April 30, 1994, within the meaning of the Letter or Understanding? In our view, the answer is no. The clear and shared intention of the parties was that Labourers' 183 would take over Bricklayers Local 1 in some fashion, and that Bricklayers Local 1 would cease to exist insofar as dealings with the MTABA were concerned. The parties agreed that a merger would not be the only method of accomplishing this. But Labourers' 183 had still to take over Bricklayers Local 1, so that it was Labourers' 183 itself that the MTABA was to deal with in the future. The parties do not dispute this shared intention.

24. The MCUTV, as a certified council of trade unions, is a trade union in its own right, but it is not the same entity as Labourers' 183. The MCUTV is a separate and distinct trade union with its own separate and independent existence. In dealing with MCUTV, the MTABA is not dealing with Labourers' 183, but with a different union. This fact remains true even if the individual people who act on behalf of the MCUTV are the same people who act on behalf of Labourers' 183. They are still acting in different capacities for a different entity. The dominance of Labourers' 183 personnel does not mean that it is now with Labourers' 183 that the MTABA would have to bargain.

25. More importantly, Labourers' 183 suggests that what has taken place is akin to a successorship under the *Labour Relations Act*. As Labourers' 183 put it, MCUTV meets the requirements of a successor union with respect to Bricklayers Local 1 and Labourers' 183. However, no union successorship application has been brought or is pending. Although the constitution of Bricklayers' Local 1 was amended to authorize a merger, amalgamation, or transfer of jurisdiction to another union, the motions later passed only authorized the MCUTV to act as agent and representative. The motions did not transfer any jurisdiction away from Bricklayers Local 1.

26. The formation of a certified council of trade unions does not have the same legal or practical effect as a union successorship under the Act. Under the latter, the predecessor union gives up all its bargaining rights as exclusive bargaining agent. This is not true in the case of a certified council of trade unions. The constituent members still retain significant and meaningful authority. Again, the motions passed by Bricklayers Local 1 authorizing the MCUTV to act on its behalf do not indicate that Bricklayers Local 1 itself could no longer exercise its bargaining rights. Its delegation of authority to MCUTV does not eliminate its own authority in the area delegated. Bricklayers Local 1 may well remain able to file certification applications and assert existing bargaining rights with respect to MTABA members.

27. The formation of the MCUTV goes a long way towards satisfying the requirement for a "common Union", but not far enough. Neither legally nor practically is the MCUTV a "common Union" of Labourers' 183 and Bricklayers Local 1, within the meaning of this phrase in the Letter of Understanding. Accordingly the Board issued its prior decision indicating that no "common Union" had been formed, and that the subcontracting clause was by its own terms of no force and effect after April 30, 1994.

1988-94-R Hospitality & Service Trades Union Local 261, Applicant v. FJS Holdings (c.o.b. as My Cousin's Restaurant), Responding Party

Certification - Charges - Intimidation and Coercion - Membership Evidence - Board persuaded that allegations made not causing Board to doubt validity of membership evidence signed - Interim certificate issuing

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members J. A. Rundle and R. R. Montague.

APPEARANCES: Peter J. Barnacle, Ainslie Benedict, Peter Goodman, Natalie Hatina and Tracey Thompson for the applicant; Andrew Tremayne, Joe Eyamie, Same Eyamie and Joe Eyamie Jr. for the responding parties.

DECISION OF THE BOARD; November 9, 1994

1. This is an application for certification. The parties are agreed on a number of issues, but a hearing was required to deal with certain allegations regarding the applicant's conduct during the organizing campaign leading up to the application.
2. For ease of reference the applicant will be referred to as the union and the responding party as the employer.
3. A preliminary matter was raised relating to whether or not counsel for the union had a conflict of interest such that the Board should remove him as counsel on this matter. The employer had on two previous occasions retained other lawyers at the firm where union counsel works. One was a mortgage and lease matter, and the other was telephone advice about an overtime question. Both counsel relied on *MacDonald Estate v. Martin*, (1990) 3 S.C.R. 1235. As well, union counsel referred to the Board to *Countryside Food Store Ltd. v. Duncan Mills Ltd.*, a decision of the B. C. Supreme Court, Registry No. 4263/93, dated February 2, 1994. For brief oral reasons, given at the hearing, we declined to order counsel removed. The Board was satisfied that counsel was retained only to deal with the allegations concerning membership evidence. The issues arising from those allegations did not involve any factual or legal overlap with the matters previously dealt with by union counsel's law firm. We declined to comment on any future retainer. We note that both counsel seem to have taken the jurisdiction of the Board to remove a solicitor for granted. There are other views, as discussed in *Anna Wilson*, [1990] OLRB Rep. Apr. 481. As the Board was of the view in this case that even if we have the jurisdiction, we would not be inclined to remove Mr. Barnacle, the question of jurisdiction did not need to be decided.
4. The allegations before the Board relate to whether or not employees who signed cards were told that if they did not sign they would not be protected if the union came in. There were a number of allegations on which no evidence was called. We will deal only with the one on which we heard evidence. The others are hereby dismissed.
5. We heard evidence from five witnesses. For the employer we heard from Jessalyn Miller, a server and Joseph Eyamie, Jr., the manager and a member of the family which owns the employer's restaurant. For the union, we heard from three witnesses, Peter Goodman, a union staff member, Natalie Hatina, a server and Tracy Thompson, a bartender at the restaurant.
6. My Cousins is a restaurant in Ottawa, owned and run by the Eyamie family. In July, 1994 an organizing campaign was started by the union. Peter Goodman, a union staff member, was given responsibility for the campaign. Another staff member, John Kearney assisted him from time

to time. The campaign started in late July or mid August and lasted until August 31, 1994 when the application for certification was filed.

7. Mr. Goodman met Ms. Hatina and Thompson at a bar around August 13 or 14 and answered questions about unions and the organizing campaign. They subsequently spoke to other employees about the union.

8. Ms. Miller testified that Ms. Hatina, in the presence of Ms. Thompson, said, "If I did not sign a card I would not be protected." Ms. Miller told them that she did not want to sign any union card until she had met the union representatives. Ms. Thompson's recollection was that Ms. Miller was primarily concerned about strikes, and had said she would not strike. Ms. Miller, Ms. Thompson said that Ms. Hatina said to Ms. Miller that if she wasn't going to sign, if she got fired then how were they supposed to protect you and Ms. Hatina went on and explained that she did not think that if she signed that anyone would know, because it would be confidential. Ms. Miller then said she would call Mr. Goodman. Ms. Thompson explained to Ms. Miller on the same occasion that if she did something really wrong like stealing, no one was going to protect her. Ms. Hatina's account of this conversation was that she and Ms. Thompson voiced their opinions about why they thought the union would be good. Ms. Miller's version was not put to Ms. Hatina on cross-examination.

9. Ms. Miller did meet Mr. Goodman, probably about 10 days later, at a gathering at the apartment shared by Ms. Hatina and Thompson on August 29, 1994. This meeting was attended by 15 to 20 people, mostly employees at the restaurant. Two ex-employees and some relatives of employees attended. Peter Goodman and John Kearney, who had worked for the union longer than Mr. Goodman, were present on behalf of the union to answer questions. Mr. Kearney apparently did most of the talking on behalf of the union.

10. Ms. Miller said that several allegations were made by Natalie and Tracy about unlawful and wrongful dismissal of two people who had worked there. These ex-employees spoke about their departure from the restaurant at the August 29 meeting. The reasons they gave for their departure were different than ones Ms. Miller later heard from members of management. Ms. Miller thought that because the union representatives were present that these allegations must be true, although the representatives themselves did not make them. Ms. Miller said that the conversation surrounding the departure of these employees was to the effect that if "we didn't have a union we would not be protected." One of the ex-employees said that if she could be forced out so could the others; if there was no union they were not protected. Ms. Thompson testified that what she heard at the meeting was that one had quit when her schedule was changed and another left because of other undesirable circumstances at work.

11. As well, Ms. Miller testified that at the meeting she was talking to Ms. Hatina, and that she was told, as she had been on the earlier occasion recounted above, that if "I did not sign I would not be protected." Her testimony about what Ms. Hatina said was as follows: "Take a look around. See how many people are here. We have the numbers. If we go union and management goes nuts, like I would not be protected. I could not be helped." On cross-examination, Ms. Miller said she recalled that someone raised the question to one of the union officials, if they would be protected if the employer acted against them in some way. She disagreed with the proposition that the response from Mr. Kearney was that just being at the meeting would be enough to protect everyone because it would be union activity under the Act. She said she understood that being at the union meeting identified union involvement, but that you had to sign a card to get protection. She did not recall the question being raised about going to the meeting giving protection. When told Mr. Goodman would testify to the effect that the response was that employees would be pro-

tected just by being at the meeting, she testified that there was a lot of commotion at the meeting, and people talking loudly all at once. She significantly qualified her previous testimony by adding, "How the questions were asked and what was implied by their answers I can't comment on, only my understanding of them." When pressed further on cross-examination, Ms. Miller said that she may not have heard the whole question - that all she understood was that if you were at the meeting, you were already involved in the union. Later in her testimony, she said she understood that if she did not sign a card, she could lose her job for any reason her employer had, or if he "went nuts" when the union came in: "I understood the union was going in and I would not be protected if I did not sign." She recalls that Peter and his associate said that just being at the union meeting meant "we were involved in it." Later she said "I contacted him and he tried to say it meant something different. At the time I understood that if I was there I was already involved and if I did not sign I wasn't protected" (from losing her job).

12. Mr. Goodman denies that any such statements were made by him, or Mr. Kearney. He says that what was said was that eventually the company would learn of the meeting and that whether an employee signs or not the decision to attend is a right under the Act, so subsequently that would protect them. He said he did not know where the idea that you had to sign to be protected came from. Similarly, Ms. Hatina and Ms. Thompson both testified that someone raised the concern in the meeting about what would happen if they did not sign a card, would they still be protected, and that Mr. Kearney said that just being in the room was enough union activity to be protected whether employees choose to sign or not. Ms. Thompson also said that a question was asked as to whether one could get fired for participating in union activity or signing a card, and the answer was "No", and you were protected.

13. At the conclusion of the questions and answers at the meeting, Ms. Miller declared, unsolicited, that she was prepared to sign a card. She said she did this in response to the alleged mistreatment of the ex-employees. She said one was fired with two weeks notice and the other quit.

14. Ms. Miller also says she was told that they could "hire or fire" the union at any time - that if employees did not feel they were doing what they wanted they could get rid of them. It appears Ms. Hatina's understanding about decertification was somewhat sketchy, and that she may have communicated her sense to Ms. Miller. Ms. Hatina seems to have thought that after 90 days, the employees could at any time get the union out. There is no direct evidence that anyone from the union gave this information to either Ms. Hatina or Ms. Miller.

15. There was also a gathering over the Labour Day weekend, again at Ms. Hatina and Thompson's apartment. Ms. Miller recalls that she likely spoke to Mr. Goodman there, but does not recall the content of any conversation. Mr. Goodman's recollection was similarly imprecise. In any event, this was after Ms. Miller had signed, and there was no suggestion that anything relevant to her signing occurred at this meeting.

16. Ms. Miller had a change of heart about having signed in or around the first week of September. She said that she talked to Christina Eyamie who clarified "why the two employees were dismissed." In addition she had been told by friends and co-workers that the union does not guarantee job security, nor can it dictate house policy. She approached management about this, who gave her a phone number of the Ministry of Labour or the Board. She was told that the union could not guarantee job security or dictate house policy, and that it was not right to be told she could lose her job if she did not sign. With this information, she contacted Peter Goodman and asked for her card back. He informed her that the card had already been submitted and that he

could not give it back. He testified that he gave a card back to someone who had asked for it before they had gone in.

17. Ms. Miller also spoke to Ms. Hatina and Thompson, and asked Ms. Hatina if Mr. Goodman had ever said anything about job security or protection for union activity. She told Ms. Hatina that Mr. Goodman had promised her job security and she felt lied to.

18. Mr. Eyamie, Jr. testified that Ms. Hatina told him that Mr. Goodman had said that if you do not sign a card right now, we cannot protect you from getting fired. This was not put to Ms. Hatina on her cross-examination, which preceded Mr. Eyamie's testimony. His notes indicated that what was said was that the employees had to sign a card first before the union could do anything or help them do anything.

19. The union lead a significant amount of evidence about the employer's reaction to the union drive. This was because it was the union's view that the change of heart of Ms. Miller and others could only be understood in terms of the employer's reaction. Because these matters were intended to form the basis for a section 91 complaint as well, and because it is largely unnecessary to the issues in this case, we will not be making findings about the motivation of the employer. Suffice it to say, that by September 7, 1994 at the latest, employees had been made aware that dealing with a union was not management's first preference. The union alleged that employees like Ms. Miller were frightened by that knowledge, and thus they looked for a way to get around the fact that they had earlier willingly signed cards. In the end, it was not necessary to make findings on that score.

20. The employer characterized the evidence as disclosing that threats to Ms. Miller's job security had been made in order to get her to sign. This, in the context of the Board's jurisprudence, would clearly cross the line between acceptable salesmanship and misrepresentation.

21. The employer referred us to *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611, at pg. 619, para 16., and *General Motors*, [1980] OLRB Rep. Oct. 1437, para 12. He suggested that where the union is certifiable by only a slim margin, the Board should apply a higher standard of scrutiny to the reliability of the membership evidence. Further it was suggested that we consider the possibility that more than Ms. Miller's card should be scrutinized by the Board. He also referred to the distinctions the Board makes depending on whether a threat to job security was made by an inside organizer or paid staff. Counsel argues that the statements which caused Ms. Miller the most concern were made in the presence of union representatives, and that she did seek clarification which she did not find adequate.

22. We were referred to *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444 at para 11, p. 446. The evidence, says employer counsel shows that there is a doubt as to whether the membership evidence is reliable. Ordering a vote in circumstances where there are problems with the membership evidence is not a punitive measure, but a fulfilment of the Act's objectives that the true wishes of properly informed employees be respected. Counsel urged us to find that if the membership evidence was not free of cloud or taint, a vote should be ordered.

23. The union argued that what was before the Board were allegations of a breach of section 71, and that there was no evidence before the Board which justified such a finding or a finding that misrepresentations were made by employees or organizers - that the responding party had failed to discharge the onus on it. The union argues that the employees, Ms. Hatina and Thompson, did not have experience in organizing campaigns and properly referred Ms. Miller to Mr.

Goodman. Further, it is said that there is no evidence to support the idea that anything was said to the effect that employees had to sign for fear of economic livelihood. Rather, counsel submitted that the evidence was that Ms. Miller had relied on her own judgement. She asked questions, and made inquiries, as she was encouraged to do by Ms. Hatina, Thompson and Mr. Goodman.

24. The union referred us to *Madawaska Hardwood Flooring*, [1994] OLRB Rep. Mar. 267 at para. 10 and *Roy Ayranto Sales*, [1994] OLRB Rep. March 285 where comments not made by full-time organizers did not cast doubt on the reliability of the membership evidence, as well as *Alderbrook Industries*, [1981] OLRB Rep. Oct. 1331 for the point that indiscretions of employees are not to be held against the union. Counsel also referred to *JCVR Packaging Inc.*, Board File No. 2378-93-R, November 30, 1993 for the proposition that the doubt which causes the Board to order votes is only after a finding of improper conduct, not just an allegation. Further, counsel argued the discretion to order a vote should be exercised in a manner consistent with the primacy of the written membership evidence.

25. Counsel for the union suggested that the frequency of subjective assertions at a later date about the circumstances of signing are central to the new amendments requiring that changes of heart be made before the application date to be effective. She argued that inevitably things change in the work place after the application is filed, that the law recognizes that employees become frightened and seek to change what they had voluntarily done before the employer reacted. By contrast, the employer argued that the standards for membership evidence are at least as high before as after Bill 40, and that the union's conduct in this case had crossed the line.

26. To employer counsel's submission that the narrowness of the margin should influence the Board's submission, union counsel said that the legislature had fixed the confidence level at 55%, and that the Board should not find that it should be higher than that. It is only if there is some other doubt, that the Board might intervene. She also noted that the margin may be higher after the disputed classifications are dealt with.

27. We are of the view that the evidence is persuasive that neither Mr. Goodman nor Mr. Kearney told employees that they would not be protected if they did not sign. Ms. Miller's evidence, when viewed in its totality, is not sufficient to base a finding that the paid organizers made such a representation. She acknowledged that she might not have heard all of the relevant question at the meeting, and that what she was testifying to was her understanding. Although Mr. Goodman's evidence was quite unclear about the difference between what was the plan for what to say at the meeting and what was actually said, Ms. Thompson's evidence was clear that the organizers did not make the statements alleged.

28. Ms. Millers' evidence suggests that Ms. Hatina gave her the impression she would not be protected if she did not sign before or at the meeting with the union organizers. The evidence in this area is somewhat unsatisfactory, as no one asked Ms. Hatina whether she had said anything of the kind to Ms. Miller. The question to be decided then is whether a misimpression such as the one Ms. Miller may have received after talking to another employee such as Ms. Hatina should result in the Board's ordering a vote or not counting Ms. Miller's card.

29. The Board has always considered statements made by employees to each other in a different light than statements made by professional organizers. In this light, employer counsel seemed to be suggesting that Ms. Hatina and Ms. Thompson would be seen as organizers because they held two gatherings at their house to discuss the union. Although that may be true for other employees, we are persuaded by the evidence that the main relationship

between Ms. Miller and Ms. Hatina was a friendship, and that statements made by Ms. Hatina were taken by Ms. Miller as things that should be further checked out. The evidence that Ms. Miller told both Ms. Thompson and Ms. Hatina that she would not sign without an opportunity to speak to Mr. Goodman is strongly indicative of this. We are of the view that Ms. Miller could not have reasonably thought, and did not think in fact, that Ms. Hatina was an authority on this subject, or in any position to implement some difference in treatment as to whether she signed or not. Thus, she was not, in any objective sense, intimidated in our view. We find no basis in the evidence on which to make a finding under section 71 of the Act.

30. The more difficult question in the circumstances of this case is whether Ms. Miller signed because of a material misrepresentation made by Ms. Hatina. At one point Ms. Miller described what was said at the meeting as, "They were telling us that if we didn't have a union we would not be protected." At other junctures she said she was told if she didn't sign she would not be protected (and it is clear that that is one of the things she took from what was said). Unfortunately, what remains unclear from the evidence is whether what was actually said to her by Ms. Hatina was that if you (meaning employees collectively) did not sign, then you (collectively) would not be protected (i.e. if the group does not opt for the union, the union will not be able to represent you), an unobjectionable campaign statement, rather than the misrepresentation that individuals who did not sign would be treated less favourably than those who did sign.

31. The latter statement, although not something the Board could condone, when said by a fellow employee, is very similar to the statements allegedly made in *Alderbrook Industries Limited*, *supra* to the effect that if an employee did not join the union she might lose her job. The Board had this to say at para 13:

13. Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the *Labour Relations Act* and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer, are to be held against the principal parties to an application for certification. The Board can no more hold against a union a verbal threat made to an employee's job security by an indiscrete employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

We agree with those remarks. We have no evidence of widespread threats and thus we find that there is no basis on which to hold anything Ms. Hatina may have said against the union to the extent of requiring a confirmatory representation vote.

32. As to whether Ms. Miller's card should be discounted, we are of the view that the evidence is equivocal as to whether Ms. Hatina actually made a misrepresentation, or whether Ms. Miller took something which amounted to a statement that if employees did not sign for the union, there would be no union to protect the employees, as an indication that if she did not personally sign, she would not be protected while others would be. In cases such as this, where it is clear Ms. Miller did sign the card, the onus is on those who assert that the membership evidence is not reliable. The fact that Ms. Hatina's version was not put to Ms. Miller, and the fact that Ms. Miller's own evidence on this is equivocal in the way described, leaves us without sufficient foundation to find on a balance of probabilities that a material misrepresentation was made.

33. Furthermore, we find Ms. Miller's evidence persuasive that what caused her to sign

when she did was her reaction to the accounts of ex-employees and their belief that had there been a union in the restaurant, they might still have their jobs. That Ms. Miller later found management's explanation more compelling does not cast doubt on the validity of her card as of the application date.

34. The union also asked for costs of an adjournment. We are not convinced that this case is one that requires a departure from the Board's normal practice of not awarding costs, particularly when they were not requested as a condition of the adjournment.

35. We are persuaded that the allegations made do not cause us to doubt the validity of the membership evidence signed. Thus, an interim certificate is in order for the following bargaining unit:

all employees of JFS Holdings Ltd. (c.o.b. as My Cousins' Restaurant) in the City of Ottawa, save and except managers, persons above the rank of manager and payroll clerk, and pending resolution by the Board, excluding as well, assistant managers.

36. The parties are in dispute about a number of positions and have agreed to examinations. A Labour Relations Officer is hereby authorized to inquire into the duties and responsibilities of the individuals in the disputed positions and to report to the Board thereon.

1602-94-M National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada), Applicant v. Reynolds-Lemmerz Industries, Responding Party

Duty to Bargain in Good Faith - Interim Relief - Remedies - Unfair Labour Practice - Board making interim order directing employer to permit union to post notice of union meetings and information concerning collective bargaining - Employer directed to immediately post notice of union membership meeting produced by union at hearing - Employer also directed to meet with union's bargaining committee within 14 days in order that parties bargain in good faith and make every reasonable effort to make a collective agreement

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *W. H. Wightman* and *J. Redshaw*.

APPEARANCES: *Lisa Kelly*, *Bruce Davidson*, *Henry Darrell*, *John Hill*, *Morgan Lawrence* and *Bryon Doucette* for the applicant; *Phillip J. Wolfenden* and *Ray McPherson* for the responding party.

DECISION OF THE BOARD; November 8, 1994

1. This is an application for interim relief pursuant to Section 92.1 of the Act.
2. At the hearing of this matter on August 10, 1994, the Board issued the following oral ruling:
 - (a) an order that the responding party permit the applicant to post, in the same location within the plant which was approved for the posting of a notice of a union meeting prior to July 18, 1994, notice of union meetings and information concerning collective

bargaining. The responding party shall immediately post the notice of a union membership meeting scheduled for August 16 and 17, 1994, which was produced by the applicant at the hearing. This order shall not be construed as limiting the right of employees to communicate about the union in any other manner or at any time which may eventually be determined to be protected union activity by the panel hearing the main application; and,

- (b) an order that the responding party meet with the applicant's bargaining committee, within 14 days of the date of this decision, in order that the parties may bargain in good faith and make every reasonable effort to make a collective agreement.

3. These are our reasons for that decision.

4. Most of the facts in this matter were not in dispute. On March 28, 1994, the applicant ("the union") was certified on an interim basis as the bargaining agent for employees of the responding party ("Reynolds-Lemmerz"), pending resolution of the bargaining unit description. On April 7, 1994, the union gave notice to bargain to the company.

5. On April 25, 1994, however, the company filed a request for reconsideration of the certification together with a complaint under section 91 of the Act alleging coercion and forgery by the union with respect to the membership evidence. As a result, the company advised the union, in the face of two further requests to meet to bargain, that it was not prepared to commence bargaining until its allegations had been dealt with by the Board.

6. The Board investigated the allegations made by the company, and in a series of decisions dated May 3, May 25 and June 27, 1994, determined that they were without substance. The request for reconsideration and section 91 complaint were withdrawn by Reynolds-Lemmerz.

7. The union then renewed its request that bargaining begin, proposing meeting dates between July 18 and 29, 1994, after the plant shutdown. The company did not respond to this request. Instead, on July 6, 1994, Reynolds-Lemmerz applied to the Board, asking that it exercise its discretion to order a representation vote, despite the fact that the union had filed evidence of membership support among more than 55% of the employees in the bargaining unit. The union vigorously opposes that request. Reynolds-Lemmerz now takes the position that it will not meet to bargain with the union until the Board has dealt with this second request for reconsideration.

8. During this same period, the union made certain efforts to communicate with employees in the bargaining unit. At some point prior to the end of June, the union requested and received permission from Reynolds-Lemmerz to post a notice announcing a union membership meeting. On June 30, 1994, the union again requested permission to post notices of union meetings. Reynolds-Lemmerz did not respond to this request, but they now state that they decided, due to "inappropriate behaviour on the part of some Committee members" which was not detailed, to permit no further postings until a collective agreement specifying a procedure for postings had been negotiated.

9. On July 18, 1994, several members of the union bargaining committee distributed notices of a union meeting to employees at Reynolds-Lemmerz. In sworn declarations filed by the union, these employees assert that the notices were handed to employees in the cafeteria and in a hallway adjacent to the cafeteria and to the employee changerooms, in the half hour prior to the start of the evening shift. Later during that shift, the employees involved with the distribution were warned by a foreman, in the presence of a company security guard, that they were not to distribute literature or solicit on company property at any time. They were further advised that this was a verbal warning and that they would be sent home if this happened again.

10. The company in its response asserts that the union notices were distributed throughout the shift, during breaks, left in the cafeteria and on the Company Communication Board. The union has objected, however, to these assertions of fact, on the basis that the declarations filed in support of them do not conform to the Board's rules requiring that declarations contain only first hand knowledge. The company filed two declarations, one from Charles Dickieson, the machining foreman who imposed the discipline on the committee members, and another from James D. Gray, the Director of Administration. The one signed by Dickieson states that all of the facts contained in certain enumerated paragraphs in the application, as modified by the response, are within his personal knowledge. This list of paragraphs does not include the paragraph which describes the distribution of literature on July 18, 1994.

11. The declaration signed by Gray states that all of the facts in the application agreed to in the response, together with the facts contained in the response, are within his first hand knowledge. However, it is nowhere asserted that Gray was even present at Reynolds-Lemmerz during the distribution of literature on July 18, 1994, or when discipline was imposed later that night, or that he was present for the next incident on July 22, 1994. Similarly, some of the facts asserted in the response could only be within the personal knowledge of others who did not sign declarations, such as the security guard. It seems clear, therefore, that all of the facts set out in the response were not within the first hand knowledge of Gray. At best, we can presume that he was in the possession of certain hearsay information when he swore his declaration. If that was the case, however, then the declaration should at a minimum have indicated the source of his information and belief; more appropriate would have been the filing of additional declarations, particularly where, as here, the company was seeking to establish a significant, and disputed, fact.

12. These inadequacies in the declarations filed by the responding party were not critical to the present case, as we have accepted the facts asserted by the applicant as true in assessing whether or not they make out an arguable case. To the extent that the declarations filed on behalf of Reynolds-Lemmerz relate to arguments about relative harm, however, we have considered only those facts which were within the first-hand knowledge of the employer declarants or not in dispute between the parties. There may be cases, moreover, where the presence of a significant factual dispute might be relevant to assessing whether or not an arguable case has been made out. For this reason, parties would be well advised to have careful regard to Rules 86 and 89 of the Board's Rules of Procedure, which require that both applications and responses in interim relief proceedings include declarations signed by persons with first-hand knowledge.

13. The final incident in the present case occurred on July 22, 1994, when members of the union bargaining committee again made efforts to distribute union literature at Reynolds-Lemmerz. This attempt followed an exchange of correspondence on July 21, 1994 between a staff representative of the union and Gray on behalf of the company, in which the union asserted its right to distribute union literature without threat of discipline, and Reynolds-Lemmerz stated that any distribution on company property at any time was in violation of company rules and that members of the union breaching these rules would be disciplined.

14. On July 22, 1994, two employees again handed out union material, this time a leaflet concerning the union's non-economic bargaining proposals, during the half hour prior to the start of the evening shift, in the cafeteria and hallway described in paragraph 9 above. Shortly after they began, they were advised by Dickieson, in the presence of a company security guard, that they were being suspended until further notice because of their distribution of material on company property. Both employees were escorted off the premises by the security guard. They were later advised that the suspension was for one shift. A third employee, also a member of the bargaining committee, who had not been involved in the distribution, was also given a verbal warning not to

solicit on company property under threat of suspension, shortly after the suspensions were imposed on July 22, 1994.

15. The union claims in a complaint made to the Board pursuant to section 91 of the Act that Reynolds-Lemmerz is violating sections 3, 15, 65, 67, 71, 81 and 81.2 of the Act by refusing to meet to bargain for a collective agreement, and by prohibiting all union communication at the workplace. In this application for interim relief, they sought, among other things, a Board order requiring the responding party to meet and to bargain in good faith and also permitting the union to communicate with its members through postings and the distribution of literature, pending the disposition of the main application.

16. In numerous previous cases dealing with section 92.1, the Board has undertaken a two-step inquiry. First, the Board assesses, based upon the materials before it and assuming that the facts relied upon by the applicant are true, whether or not the applicant has made out an arguable case for the relief sought in the main application. If an arguable case is shown, the Board then balances the harm in not granting the interim relief sought against any harm which would result from granting it, in the context of the purposes and the scheme of the Act, to determine whether or not a remedy should be ordered. (see *810048 Ontario Limited c.o.b. as Loeb Highland*, [1993] OLRB Rep. March 197 at paragraphs 26, 33 and 34; *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. March 242 at paragraphs 9 and 11; *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019 at paragraphs 51 and 55; *J.C.V.R. Packaging Inc.*, [1993] OLRB Rep. Nov. 1145 at paragraphs 14 and 17).

17. After reviewing a number of cases interpreting section 15 of the Act, we concluded that the applicant had made out an arguable case that the refusal by Reynolds-Lemmerz to meet to bargain might constitute a failure to bargain in good faith. Equally, we were satisfied that there was an arguable case for the remedy sought, given that the Board has in numerous cases ordered the parties to meet to bargain once a violation of the Act has been made out.

18. Reynolds-Lemmerz urged us not to order the parties to meet, as in the submission of their counsel bargaining would serve no practical purpose while their application to the Board for a vote is outstanding. We note that their application is essentially a request for reconsideration, as the Board has already interim certified the applicant, without a vote, in its decision of March 28, 1994. A request for reconsideration does not automatically stay the decision of the Board complained of, which is presumptively a final and conclusive decision. And the decision of the Board to issue an interim certificate, given that the outstanding dispute as to the inclusion or exclusion of certain employees could not affect the applicant's right to certification, does not alter the fact that the certification is fully in effect.

19. By asking that we delay bargaining pending the outcome of this request, then, Reynolds-Lemmerz is effectively asking us to suspend the effect of the certification decision, given that the obligations under section 15 follow automatically from certification and the delivery of notice to bargain. Whether or not this latest request to the Board by the responding party has merit and is likely to succeed, it would be contrary to the interests of the Board and of parties who come before it to permit a responding party to avoid the consequences of certification by filing a series of requests for reconsideration, as has been done here. No compelling labour relations reasons were advanced by Reynolds-Lemmerz which would mitigate against this concern for finality and certainty in the litigation process. For these reasons, we did not consider the responding party's request for a vote to be relevant to the issue of remedy in this matter.

20. We were also satisfied that the applicant's allegations concerning the prohibition by the company of union communication made out an arguable case. While the Board has considered

restrictions on union activity in previous cases, no clear guidelines have been established in the caselaw as to what type of communication will be permitted on company premises, in what circumstances. However, the following statement in *The Adams Mine, Cliffs of Canada Ltd.*, [1982] OLRB Rep. Dec. 1767, at paragraph 22, suggests a general approach to these issues:

• • •

- (a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;
- (b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any time on the employer's property are valid in the absence of an application for a direction pursuant to section 11.

Considering these principles in the context of this case, the applicant's allegations, if proven, would appear to have some prospect for success, thus meeting the test for an arguable case.

21. The responding party argued that we should not consider the situation in this case to amount to an arguable breach of the Act, given that the union activity engaged in by the employees who were disciplined was not related to solicitation of employees to become members of the union. Counsel for Reynolds-Lemmerz suggested that the Board's previous cases dealt only with union activity of this sort, and that a finding of an arguable case here would thus be a significant advance of the Board's jurisprudence. We rejected this argument based on the decisions in *The Adams Mine, Cliffs of Canada Ltd.*, *supra*, and in *Sobeys Inc.*, [1993] OLRB Rep. July 675, where the Board considered the limiting of union activity relating to canvassing for a federal election campaign, and in the latter case, a general prohibition against union activity or discussion of union related issues on company premises. Given the application by the Board of the principles set out in paragraph 19 in each of these circumstances, we were satisfied that they might equally be relevant to this case.

22. Having found an arguable case with respect to both the responding party's refusal to meet to bargain and the limitation on union communication, we considered the balance of harm with respect to the interim relief sought.

23. The union alleged that the employer's prohibition on communication with employees had substantially undermined their status and reputation as the employee bargaining agent; that by the employer's conduct it was effectively refusing to acknowledge that the union was the legitimate representative of the employees. In addition, the union asserted that the public nature of the disciplinary incidents meant that a clear message had been sent to employees that despite the interim certification they were still at risk if they associated with the union. This "chilling effect", combined with the prohibition on workplace communication, was alleged to impede the union's ability to communicate with its members about bargaining issues and thus to build spirit and momentum in bargaining, as well as to interfere with their ability to prepare for bargaining.

24. The main harm associated with the refusal by Reynolds-Lemmerz to meet is clearly a delay in bargaining, but the union claimed that delay was similarly impacting on their status and reputation with employees. The union asserted that bargaining, particularly for a first collective agreement after a long and difficult battle for certification, is time sensitive, and that they needed

to act quickly to build momentum and employee spirit and cohesiveness in order to anticipate the possibility of mounting a successful strike. They noted that this was particularly the case given the employer's continuing efforts to fight the certification through requests for reconsideration, as described above.

25. Reynolds-Lemmerz made no explicit claim that any harm would arise from an interim order requiring them to meet with the union to bargain. They did, however, as noted above, assert that such an order would serve no practical purpose given their request for a vote, which could be considered as an assertion of at least inconvenience. The inconvenience of having to meet to no end would only arise, however, *if* the request for reconsideration resulted in a vote, and *if* the vote resulted in the application for certification being dismissed. Otherwise, any meetings held and bargaining completed would certainly serve some purpose at the end of the day.

26. The only harm asserted by Reynolds-Lemmerz in the response to the application was that its right to effectively manage its workplace would be seriously undermined if interim relief was granted. There was no specific assertion, however, of any threat to production or discipline arising from intervention by the Board; rather, Reynolds-Lemmerz seemed concerned generally that ordering it to meet with the union and/or to permit union communication at the workplace would constitute a challenge to its authority in the workplace.

27. As this form of challenge to the authority of the employer is a harm that will almost always arise from Board intervention in the workplace to enforce legal rights, we did not consider it a serious impediment to the granting of interim relief in this application, when weighed against the harm asserted by the applicant. While in situations other than interim relief applications such intervention generally occurs only after a finding of a violation of the Act, the legislature has now explicitly given the Board the power to act in a way which may interfere, on an interim basis, with the employer's discretion to manage the workplace, in order to prevent or at least limit the harm which may flow from an arguable violation of the Act during that interim period. Thus, it does not seem appropriate that such "interference" be asserted generally as a harm which may offset the specific harm arising from the alleged violation of the Act.

28. Similar considerations were discussed by the Board in *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019 at paragraphs 64 and 65:

64. The reinstatement of the aggrieved employees may well interfere with what the company describes as its "management rights". But in the context of an unfair labour practice proceeding, that phrase has little analytical content; for what is really at issue is the existence, basis or extent of such "management rights" (here to unilaterally dispose of employees), in light of the statutory rights and processes set out in the *Labour Relations Act*.

65. No one doubts the employer's right, more or less, to deal with its property and run its business as it sees fit; nor does this panel question the value of entrepreneurial initiative, business flexibility, and so on. That, too, is part of the "economics and psychology permeating the situation at issue" mentioned by the Board in *Radio Shack*. But whatever the content of these "management's rights", they must be exercised within a framework of law which here contemplates a weighing of relative harm; and if financial, economic, or organizational interests are to be weighed in the balance, they must be identified and substantiated.

29. Given the various harms asserted, then, we were satisfied that there was significant potential harm to the union arising from the conduct of the employer, and no substantial harm to Reynolds-Lemmerz which might arise from the provision of interim relief. Furthermore, we concluded that an order requiring the parties to meet forthwith to bargain with a view to concluding a collective agreement, combined with permission for the union to establish contact with employees in the workplace, would be appropriate interim remedies in the circumstances.

30. Reynolds-Lemmerz argued, however, that these orders were not appropriate in the context of an interim relief application. In that regard, counsel for the responding party asserted that to grant the union any rights to communicate with employees in the workplace would be to give the union a “bargaining breakthrough”, as in the employer’s view such matters are entirely a subject for bargaining.

31. We rejected this assertion that the right to communicate about union matters and engage in union activity at the workplace, particularly during non-working hours, was a right only obtained through bargaining, given the Board’s prior jurisprudence as discussed above. These earlier cases seem to establish that some union activity at the workplace will be protected by the Act, while the precise nature and scope of this activity has not been clearly delineated. Thus, we concluded that to order that the union be permitted some access to employees at the workplace would not go beyond the Board’s potential remedial authority on the main application. At the same time, however, we were cautious about delving too deeply into questions about the scope and nature of such protected activity, as to do so would require us to venture too far into the merits. For these reasons, and considering that the immediate harm caused by the absolute prohibition on union communication was really to the union’s participation in the bargaining process, we required Reynolds-Lemmerz to permit only the posting of notices concerning union membership meetings and information concerning collective bargaining during the interim period.

32. We were also influenced in our decision to permit the posting of notices, rather than communication by other means such as distribution of material, by the fact that Reynolds-Lemmerz had previously permitted, and the union had presumably been satisfied with, just such a posting. The specific reasons for the change of policy were not detailed in the materials filed, as noted above, but in any event we were satisfied that this situation was effectively the “status quo” in terms of permissible union communication prior to the onset of the present dispute.

33. The union asked that we also order a posting at the workplace setting out the nature of the application and the interim relief granted. While the Board frequently does require the posting of such notices when interim relief is granted, we concluded that a notice in these circumstances might be counterproductive. Specifically, we were concerned that the decision to permit only the posting of notices at this interim stage might be perceived by employees as a limitation by the Board on other forms of communication about the union, including discussion among employees and the distribution of union material during non-working hours, which might be seen as a pre-judgment on the merits of this matter. A similar concern was expressed by the Board in *Sobeys*, *supra*, at paragraph 18. While the limits on the activities of the bargaining committee members in the present case were imposed in a more public fashion than in *Sobeys*, which might commend the notion of a posting, we were satisfied that the union would be able to adequately explain the nature of the application and the Board’s interim ruling directly to interested employees, given the Board’s order that Reynolds-Lemmerz permit the posting of notices of union meetings.

34. For all of these reasons, the Board issued the orders detailed in paragraph 2 above after hearing the submissions of the parties.

2287-94-R United Steelworkers of America, Applicant v. Seeburn Division of Ventra Group Inc., Responding Party

Certification - Evidence - Membership Evidence - Form A-4 declarant disclosing that ten membership cards received by mail and that no additional steps taken to verify membership evidence - Board not prepared to give full evidentiary weight to mailed membership cards where declarant's only basis for asserting that cards signed by persons indicated on them is declarant's knowledge that cards received at union office in sealed business reply envelopes on specified dates, that the envelopes were delivered to desk of receiver on those dates, and that receiver opened the envelopes personally and signed cards on those dates - Board directing taking of representation vote

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Kobryn*.

APPEARANCES: *Brian Shell, Brad James, Brando Paris, Courtney Joseph* and *George Cassellman* for the applicant; *Joseph Liberman, Ross Chandler* and *Ruth Griepsma* for the responding party.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER R. W. PIRRIE;
November 21, 1994

1. In a decision dated October 27, 1994, a majority of this panel of the Board (with Board Member Kobryn reserving his decision) wrote as follows:

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of Ventra Group Inc. in its Seeburn Division in the Town of New Tecumseth, save and except supervisors, persons above the rank of supervisor, and engineering, office, clerical, sales, security staff and students employed on a co-op work/study program, constitute a unit of employees of the responding party appropriate for collective bargaining.
4. For reasons which will issue at a later date, the majority of this panel of the Board, with Board Member Kobryn reserving his decision, hereby directs that a representation vote be taken of the employees of the responding party in the bargaining unit described above.
5. All employees of the responding party in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.
6. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their relations with the responding party.
7. The matter is referred to the Registrar.

2. The purpose of this decision is to provide our reasons for directing that a representation vote be taken in this matter.

3. The matters in dispute between the parties concern the weight, if any, to be given to the mailed membership cards which form part of the membership evidence filed by the applicant (also referred to in this decision as the "Union"), and the validity of the applicant's Form A-4 Declaration Verifying Membership Evidence Before The Ontario Labour Relations Board (the "Declaration") insofar as it pertains to those mailed cards.

4. Rule 43 of the Board's Rules of Procedure provides, in part, as follows:

An applicant for certification as bargaining agent must file not later than the application filing date:

• • •

- (c) a declaration verifying the membership evidence in the form set by the Board.

5. The Declaration filed by the Union in support of this application was signed by Robert Healey (of Counsel for the applicant). Paragraph 3 of that Declaration reads as follows:

On the basis of my personal knowledge or inquiries I have made, the documents were signed by the employees indicated on the documents, except in the following instances: **See Appendix "A" for particulars regarding specific cards.**

6. Ten of the twenty-one paragraphs included in Appendix "A" to the Declaration pertain to cards which the Union received by mail. Each of those ten paragraphs reads as follows:

With respect to the card of [the name which appears on the card], the applicant for membership signed the card on [the date which appears on the card] and sent the card to the Applicant in a sealed business reply envelope. The envelope was received at the union's office at 25 Cecil Street, Toronto on [the date of receipt]. The envelope was delivered to the desk of the receiver on that date and the receiver opened the envelope personally and signed the card on that date.

7. Mr. Healey was away on his honeymoon on the date of the hearing of this matter and, accordingly, was unavailable to serve as a witness. However, it was common ground between the parties that it was unnecessary to have him testify as both parties were content to argue the case on the basis of the aforementioned contents of the Declaration, and the following facts stipulated by counsel for the Union:

The reason there is no disclosure [in the Declaration] of any direct contact which anyone had with the persons who signed mailed-in cards is because there was no such further contact. Once the card was received from the applicant, the Form A-4 declarant did not go behind the signature and query directly to the applicant whether the applicant actually signed the card and sent it in [nor did the receiver]. The Form A-4 declarant spoke with the person who received the card and ascertained the facts regarding the receipt.

8. The substantial importance which the Board places upon declarations concerning membership documents is well established in the Board's jurisprudence. See, for example, *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223, in which the Board wrote:

13. ... In certification proceedings the Board places heavy reliance upon the membership evidence filed by the union. Because of the consequences of the reliance that the Board places on what is a form of hearsay evidence which is not disclosed to the employer and is not subject to cross-examination, the Board requires a high standard of integrity in the nature and quality of the membership evidence filed. It is for an applicant trade union to satisfy the Board that every membership card upon which it relies was signed by the employee on whose behalf it is tendered and that each employee has paid the initiation fee that accompanies it. It is for this purpose that the Board requires (pursuant to Rule 6) a Form 9 declaration concerning membership documents to be filed in every application for certification.

14. The Form 9 declaration is so important that if one is not filed, the Board will give no weight to the union's membership evidence (see for example *Pietrangelo Masonry*, [1981] OLRB Rep. Feb. 218). If a Form 9 is filed but it is subsequently revealed either that no inquiry was in fact made by the declarant, or that the declarant failed to indicate in it discrepancies in the membership evidence of which he was aware, the Board may dismiss the application on the basis that no weight can be given to the declaration (see *Bond Place Hotel* [1983] OLRB Rep. Feb. 202).

Where there are irregularities or discrepancies noted in the Form 9, the Board's practice is to concern itself with the acceptability of only the cards to which these apply....

9. Although that passage refers to the Form 9 Declaration Concerning Membership Documents Before the Ontario Labour Relations Board, which was the (pre-Bill 40) predecessor of The Form A-4 Declaration Verifying Membership Evidence Before The Ontario Labour Relations Board, similar considerations apply to the Form A-4 Declaration.

10. Paragraph 3 of Form 9 pertained to the payment and collection of money on account of dues or initiation fees. One of the results of the Bill 40 amendments to the *Labour Relations Act* is that the Board is no longer required or permitted to consider whether any such payments have been made. (See subsection 105(4.1) of the Act which provides: "In determining whether a person is a member of a trade union or has applied for membership, the Board shall not consider whether the person has made any payment that the trade union may require.")

11. The form initially set by the Board for use by applicants in complying the requirement contained in Rule 43(c) read as follows:

Form A-4

Labour Relations Act

DECLARATION VERIFYING MEMBERSHIP EVIDENCE

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

Applicant,
- and -
Responding Party,
- and -
Intervenor.

I _____ the _____
(name) (office)

of the applicant declare that, to the best of my knowledge, information and belief:

1. The documents submitted in support of the application represent documentary evidence of membership on behalf of _____
(number)

persons who were employees of the responding party in the bargaining unit that the applicant claims to be appropriate for collective bargaining on the date of the making of the application.

2. There were _____ persons who were employees of the responding party in
(number)
the bargaining unit that the applicant claims to be appropriate for collective bargaining on the date of the making of the application.

DATED _____

(Signature)

12. In December of 1993, the labour relations community was notified of revisions which the Board had made to that form, by means of the following notice included in the December 1993 issue of "Highlights":

Board revises Forms A-4 and A-67 (Declaration Verifying Membership Evidence)

The Board has recently revised its Form A-4 (Declaration Verifying Membership Evidence) and Form A-67 (Declaration Verifying Membership Evidence, Construction Industry), copies of which are attached to this issue of Highlights. Under Rule 43(c) of the Board's Rules of Procedure, an applicant for certification as bargaining agent must file a Form A-4 (or, in the construction industry, Form A-67) not later than the application filing date. The revised Forms A-4 and A-67 differ from their predecessors in two ways. First, they use the term "application date" rather than "date of making of the application", consistent with section 8 of the Act. Second, they clarify (through a new paragraph #3) that the Form A-4 or Form A-67 declarant is also representing membership evidence filed in a certification application to be what it purports to be, namely membership evidence signed by the employees indicated on the documents. Applicant unions may begin using the revised Form A-4 and Form A-67 immediately and, in any case, *must* begin doing so by March 1, 1994.

Thus, since March 1, 1994, the Form A-4 Declaration has required Form A-4 declarants to declare that, to the best of their knowledge, information and belief, the documents submitted as membership evidence in support of the application were signed by the employees indicated on the documents, except in the instances specifically indicated by the declarant.

13. In the instant case, each of the ten membership cards which the Union received by mail has been specifically listed by the Form A-4 declarant as an exception to paragraph 3 (along with eleven other paragraphs of particulars regarding specific cards). Thus, this is clearly not a case in which the declarant has failed to indicate in the Declaration discrepancies in the membership evidence of which he was aware. However, it is a case which raises a concern about whether sufficient inquiries had been made by the declarant or the receivers to warrant the inclusion of the statement, "the applicant for membership signed the card", in each of the ten paragraphs in the Appendix to the Declaration pertaining to those ten cards. It also raises the related issue of the weight, if any, which should be given to those ten cards in the circumstances of this case.

14. Membership cards received by unions through the mail (which are often referred to as "mailed membership evidence") have been found by the Board to be valid evidence of membership in a number of cases during the past four decades. The earliest reported case to which we were referred by counsel was *Canadian Gypsum Company Limited*, [1961] OLRB Rep. Nov. 280, in which the Board "endorsed the Record" as follows:

A representative of the applicant union handed out application cards to persons entering the plant, together with a leaflet describing in clear cut terms how the cards were to be completed and returned to the union. All signed application cards were received by the union by mail. Each card came in a separate envelope and each was accompanied by a dollar payment.

While the use of the mails rather than personal solicitation to secure membership in a trade union has created problems for an applicant in establishing its membership position to the satisfaction of the Board in some cases, evidence of membership received in a manner similar to that used in the present case has been accepted by the Board in the past. It should be noted that there is here no evidence to suggest that the employees signing the application cards did not in fact pay the dollar enclosed with the card. Moreover, in our view the documents submitted to the Board by the applicant after the filing of the initial evidence of membership do not cast any doubt on this evidence first filed with the Board.

See also *Ontario Bus Industries*, [1988] OLRB Rep. Sept. 914, in which the Board wrote as follows in summarizing the Board's evolving jurisprudence in respect of mailed membership evidence, and applying it to the material facts of that case:

9. Although the use of mailed membership evidence can make it difficult for a union to refute "non-sign" or "non-pay" allegations (see, for example, *Wallace Barnes Co. Ltd.*, [1965] OLRB Rep. July 282), the Board has for many years accepted mailed membership evidence where the

union's reliance on such membership evidence is duly noted in the Form 9, or in material which accompanies the Form 9 or the mailed membership evidence filed with the Board: see, for example, *Fotomat Canada Limited*, [1979] OLRB Rep. Apr. 306; *E. B. Eddy Forest Products Ltd.*, [1977] OLRB Rep. Oct. 694; and *Canadian Gypsum Company Limited*, [1961] OLRB Rep. Nov. 280. In the instant case, Hassan Yussuff, the Form 9 declarant, advised the Board (in the above quoted letter which accompanied the Declaration) that seven membership cards had been received by mail at the Union office. Mr. Yussuff also advised the Board in that letter that each of the seven persons in respect of whom the Union had received mailed membership evidence had been contacted to confirm their application, signature, and membership fee. By means of a list attached to that letter, the Union provided the Board with the names and addresses of those seven persons. The seven envelopes in which the mailed cards were received by the Union were also filed with the Board, along with the Union's membership cards and Declaration. Mr. Yussuff is the collector whose signature appears on each of the seven cards. In view of the information which the Union has provided to the Board in the manner described above, we are satisfied that, subject to the Board's usual "second check", the seven membership cards in question meet the Board's requirements with respect to mailed membership evidence.

15. That more is required of an applicant in respect of mailed membership evidence than was done by the Union in the instant case is evident from the Board's decision in *E.B. Eddy Forest Products Limited*, [1977] OLRB Rep. Oct. 694. The material facts pertaining to the mailed membership evidence are described in the following manner in paragraph 35 of that decision:

The evidence is, in respect to all applications received by mail, that they were addressed to Peel [a labour relations consultant] who passed them unopened to Kennedy [the employee who acted as the prime collector in the organizing campaign and who signed the declaration] who opened them in Peel's presence. Kennedy testified that each envelope contained one dollar and that he signed as the collector. Kennedy further testified that he himself phoned 10 of the mail applicants to confirm that they had signed a card and enclosed the money. Kennedy further testified that in respect to 3 others he got "another guy" to check for him and he reported back that he had checked with the individuals concerned and they reported it was "okay". Peel further testified that he had phoned one such person and the evidence is imperfect as to whether he reported the results of that conversation to Kennedy.

The Board ruled that it was "satisfied that the testimony of Kennedy relative to the subsequent inquiries made of the applicants for membership to verify their actions entitles such applications to be accorded normal evidentiary weight". However, it also ruled that it would "disregard the evidence of membership of [the] one individual checked by Peel, at Kennedy's request, without evidence of the results of that enquiry being reported back to Kennedy." Thus, the Board was not prepared to give any weight to a mailed membership card where the only knowledge which the declarant possessed concerning its validity was his personal observation of the opening of the envelope in which the card and the dollar which accompanied it were received by mail.

16. The cases to which we were referred by counsel during the course of their able submissions indicate that applicants relying upon mailed membership evidence have generally adopted the practice of contacting each of the individuals in respect of whom mailed evidence has been received, in order to confirm that each of them has in fact signed a membership card and mailed it to the union, with any required monetary payment. See, for example, *Frontenac-Lennox and Addington County Roman Catholic Separate School Board*, [1988] OLRB Rep. Sept. 888; *Ontario Bus Industries*, *supra*; *Fotomat Canada Limited*, [1979] OLRB Rep. April 306; *E.B. Eddy Forest Products Limited*, *supra*; and *Centrac Industries Limited*, [1977] OLRB Rep. Oct. 701. It is clear from those cases that the Board is generally prepared to give full weight to mailed membership cards where that practice has been followed and the union's reliance upon such membership evidence has been duly indicated in the declaration.

17. As noted by counsel for the Union, one of the purposes of the *Labour Relations Act*

specified in section 2.1 of the Act is to “ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union”. In view of that purpose and in view of the difficulties which may be encountered in some circumstances by unions in attempting to contact each of the individuals in respect of whom mailed evidence has been received, it may well be that the Board will be prepared to give full evidentiary weight to mailed membership evidence where, although the union has been unable to contact some or all of the individuals in respect of whom mailed evidence has been received in order to confirm that each of them has in fact signed a membership card and mailed it to the union, other circumstances provide a reasonable basis for the declarant’s belief that the cards were signed by the employees indicated on them. This might occur, for example, where a union organizer provides an employee with a numbered or otherwise identifiable membership card which is subsequently received in the mail by the union bearing what purports to be that employee’s signature, or where a union organizer visits an employee at the employee’s residence and gives the employee a blank membership card, together with an envelope addressed to the organizer, and subsequently receives by mail that envelope containing a membership card bearing what purports to be that employee’s signature.

18. It is neither necessary nor appropriate for the Board to attempt in this decision to delineate all of the circumstances in which mailed membership evidence might appropriately be accorded full evidentiary weight even though the applicant has not contacted each of the individuals in respect of whom mailed evidence has been received, in order to confirm that each of them has in fact signed a membership card and mailed it to the union. It is sufficient for present purposes to indicate that, in the absence of any such circumstances, the Board is not prepared to give full evidentiary weight to mailed membership cards where the declarant’s only basis for asserting (as Mr. Healey did in the aforementioned ten paragraphs of Appendix “A” to the Declaration) that the cards were signed by the persons indicated on them is the declarant’s knowledge or information that the cards were received at the Union’s office in sealed business reply envelopes on specified dates, that the envelopes were delivered to the desk of the receiver on those dates, and that the receiver opened the envelopes personally and signed the cards on those dates.

19. It is true, as contended by counsel for the Union, that the Board’s practice of comparing the signatures contained on membership cards with the sample employee signatures provided (pursuant to Rule 45) by the employer named in the certification application provides an element of protection against certificates being issued on the basis of forged employee signatures. Indeed, this comparison is done not only once, but also a second time as part of the Board’s usual “second check”. However, the Board is not always provided with sample employee signatures, and in cases where such signatures are filed with the Board they are sometimes incomplete. In the instant case, for example, although sample signatures have been filed with the Board in respect of most of the employees listed on the schedules of employees, the Board has not been provided with sample signatures for a number of the individuals in respect of whom the applicant has filed mailed membership evidence. Moreover, as indicated by the Board in the above-quoted passage from *Grand & Toy Limited, supra*, and in numerous other decisions, it is for the applicant union to satisfy the Board that every membership card upon which it relies was signed by the employee on whose behalf it is tendered.

20. In the circumstances of the instant case, it is unnecessary for the Board to determine whether the Union’s failure to satisfy the Board that the mailed membership cards upon which it relies were signed by the employees on whose behalf they are tendered should cause those cards to be entirely disregarded by the Board (as occurred in *E.B. Eddy Forest Products Limited, supra*), or should merely cause the Board to give them reduced evidentiary weight. The former would result in a representation vote being directed pursuant to subsection 8(2) of the Act, on the basis of

more than 40 per cent but not more than 55 per cent of the employees in the bargaining unit having applied to become members of the Union on or before the certification application date. The latter would result in the Board exercising its discretion to direct that a representation be taken pursuant to subsection 8(3) of Act. Thus, the result in either event would be the taking of a representation vote, as directed in our decision dated October 27, 1994, in this matter.

21. Thus, it was for the foregoing reasons that the majority of this panel of the Board, with Board Member Kobryn reserving his decision, directed that a representation vote be taken in this matter.

CONCURRING OPINION OF BOARD MEMBER H. KOBRYN; November 21, 1994

1. I get the distinct feeling from the labour community that this panel of the Board has been too technical in its interpretation of the Board's jurisprudence on "mail in" signed union membership cards in this organizing campaign. That feeling in the labour community may have much logic behind it, but the labour community must realize, if they don't already know, that there are tremendous forces in the industrial labour relations community committed to hobbling the Board's certification process as it presently exists.

2. So in order for the labour community to neutralize these continuous attacks with their subsequent delays and frustrations with a process that is quite straight forward, they should carefully read this decision and note its direction and then make doubly sure that *all* their union membership cards are above reproach to any challenge whether technical or otherwise. With this warning to the labour community combined with the reasons stated, I join the majority with this my concurring decision.

**2375-94-R United Steelworkers of America, Applicant v. Syl-Shar Holdings Inc.,
Responding Party**

Sale of a Business - Union alleging that lease of operation of motel's restaurant, bar and banquet facilities amounting to sale of a business - Motel agreeing to material facts in its response, but lessee not filing response - Pursuant to Rule 19 Board relying on facts set out in application, agreed to in motel's response and undisputed by lessee to find lessee to be successor employer within meaning of section 64 of the Act

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Kobryn*.

DECISION OF THE BOARD; November 21, 1994

1. In this application under section 64 of the *Labour Relations Act* the applicant union alleges that a sale of a business has taken place from the predecessor Circle Inn Limited ("Circle Inn") to Syl-Shar Holdings Inc. ("Syl-Shar").

2. The union, in its application asserts that it was certified in Board File No. 0880-93-R to represent employees of Circle Inn. Circle Inn's business included the operation of a motel and a restaurant and bar. On or about February 9, 1994 the union was advised by Circle Inn that, effective February 1, 1994, its restaurant, bar and banquet facilities would, by way of a lease arrange-

ment, be operated by another company subsequently identified to the union as Syl-Shar. Syl-Shar subsequently indicated in writing, in a letter which it copied to the union, that it wished to participate and "be active in all negotiations that affect the employees within the building area of the tenant".

3. This application was filed October 6, 1994 and a terminal date of October 21, 1994 was set. Circle Inn filed a response on October 20, 1994 in which, with a few exceptions not material for our purposes, it agreed to the material facts set out in the application. Among the documents it filed is a copy of the lease agreement dated December 31, 1993 between Circle Inn and Syl-Shar.

4. Syl-Shar has not filed a response in this matter.

5. Having regard to the material facts set out in the application, agreed to by Circle Inn, undisputed by Syl-Shar and which, in the circumstances and pursuant to Rule 19, we accept as true, the Board is satisfied and hereby declares that Syl-Shar is a successor employer within the meaning of section 64 of the Act to whom Circle Inn has sold one or more parts of its business.

1561-94-R Service Employees' Union, Local 210, Applicant v. The Canadian Red Cross Society (Ontario Division), Responding Party

Certification - Charges - Representation Vote - Signing of "Consent and Waiver" form precluding employer from relying on alleged union improprieties which it was aware of on date of vote in order to set aside representation vote - Board, in any event, determining that employer's allegations even if true would not lead to dismissal of certification application or ordering of new vote, as requested by employer - Certificate issuing

BEFORE: *Pamela Chapman*, Vice-Chair.

APPEARANCES: *Luiza Monteiro, E. R. Durham, Ken Brown, Ray Drouillard, Barb Parent and Bev Clifford* for the applicant; *Tim Liznick, Mary-Kay Croft, Sheila Gordon and Janice Laflamme* for the responding party.

DECISION OF THE BOARD; November 23, 1994

1. This is an application for certification.

2. By decision dated August 23, 1994, the Board directed that a representation vote be taken of the employees in the agreed upon bargaining unit.

3. Subsequent to the taking of the vote, representations were received from the responding party ("the employer") concerning alleged improprieties by the union and its supporters on the days of the voting. As a result, a hearing was scheduled.

4. At the hearing, the parties advised the Board of an error in the bargaining unit description set out in the Board's decision of August 23, 1994. Given the parties' agreement on this error, the bargaining unit description is hereby amended to read as follows:

all Homemakers employed by The Canadian Red Cross Society (Ontario Division) at its Wind-

sor Essex County Branch in the County of Essex, save and except supervisors, persons above the rank of supervisor, office and clerical employees and persons in bargaining units for which any trade union held bargaining rights as of August 2, 1994,

5. At the hearing on this matter on November 21, 1994, the Board issued the following oral ruling:

In the circumstances of this case, and in particular considering the distance travelled by both parties' witnesses to attend at this hearing, which is scheduled to continue day to day, I find it appropriate to provide a brief bottom-line decision, with reasons to follow.

Having considered the representations of both parties with respect to the preliminary objections made by the union, I am satisfied that signing the "Consent and Waiver" form precludes the employer from relying on alleged union improprieties which it was aware of on the date of the vote in order to set aside the representation vote. Given that the employer was aware of all but one of the allegations at the time that the form was signed, it had an obligation to bring its concerns to the attention of the union and the Board prior to the counting of the ballots, so that the ballot box could have been sealed. The failure to do so means not only that the employer was aware of the union's success in the vote at the time it brought forward these allegations, but also that the results of the vote were disseminated to employees, thus prejudicing the prospects for a second vote if one were to be ordered.

In any event, I have also concluded that the allegations made by the employer in its letters of October 3 and November 4, 1994, even if presumed true, would not lead to the granting of the remedy requested by the employer, that is either the dismissal of the application for certification or the ordering of a new vote. The test for the over-turning of a representation vote as applied by the Board is whether or not the actions complained of destroy the secrecy of the ballot or are coercive so as to prevent the true wishes of the employees from being expressed, viewed by the reasonable voter who is possessed of critical faculties, the ability to assess issues and make inquiries. I am satisfied that in the circumstances alleged, a reasonable voter possessing these attributes would have felt capable of expressing a free choice in a secret ballot, and as such the allegations, which I presume to be true for the purposes of this ruling, would not result in the directing of a new vote.

A decision will issue containing my reasons for this ruling. In the meantime a certificate will issue to the applicant.

6. On the taking of the representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

7. A certificate will issue to the applicant.

8. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

2218-94-R Ontario Liquor Boards Employees' Union, Applicant v. **The Municipality of Metropolitan Toronto**, Responding Party v. Metropolitan Toronto Civic Employees' Union, Local 43, Intervenor #1 v. Canadian Union of Public Employees, Local 79, Intervenor #2

Certification - Trade Union - Board dismissing earlier certification application on ground that employer's employees not eligible for membership under applicant's constitution - Union making subsequent application - Board finding that amendments to applicant's constitution effective to cure defect regarding restriction on membership

BEFORE: *S. Liang*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *C. Flood*, *John Coones*, *Don McDermott* and *Julia Noble* for the applicant; *Colleen Edwards*, *Harold Ball*, *Bill Taylor* and *Joe Brinkos* for the responding party; *Frank Luce* and *Denis Casey* for Canadian Union of Public Employees, Local 79; no one appearing for Metropolitan Toronto Civic Employees' Union, Local 43.

DECISION OF THE BOARD; November 21, 1994

1. This is an application for certification. There are a number of outstanding issues to be resolved in this application. The parties agreed to appear before the Board on November 7, 1994 to deal with a preliminary issue concerning the applicant's (also referred to herein as the "OLBEU") ability to accept for membership the employees in the proposed bargaining unit. Further hearing dates in December have been scheduled to deal with the remaining issues, if necessary.

2. It is the position of the Canadian Union of Public Employees, Local 79 ("Local 79") that recent amendments to the applicant's constitution, purporting to cure a defect which was the basis of an earlier Board decision (in Board File No. 0322-94-R), were not effective. The responding party (referred to herein as "Metro" or "the employer") takes no position with respect to this issue. The Metropolitan Toronto Civic Employees' Union, Local 43 has also intervened in this application, but did not participate at the hearing with respect to this preliminary matter and appears to take no position on it.

3. Board File No. 0322-94-R was an earlier application for certification filed by the applicant, regarding the same unit of employees. In a decision dated June 15, 1994, for which reasons were provided on July 5 [now reported at [1994] OLRB Rep. July 938], the Board dismissed the application for certification. The Board found that the employees for whom the applicant sought to obtain bargaining rights were not eligible for membership in the applicant under the provisions of its Constitution. Further, the Board concluded that neither did the applicant have an established practice of admitting persons to membership without regard to the eligibility requirements of its Constitution.

4. In response to the decision of the Board, the applicant, by motion passed unanimously at a Special Meeting of the Provincial Executive on August 3, 1994, amended the membership provision of its Constitution. Prior to passing this motion, the Executive, among other things, also passed a motion amending the Constitution to allow for constitutional amendments to be made at a Special Meeting. The terms of the Constitution provide for constitutional amendments to be made at Policy and Objectives Conferences. The applicant argues as a matter of interpretation that these

provisions do not preclude the possibility of such amendments also taking place at Special Meetings.

5. The membership evidence which has been submitted in support of this application was collected after the amendment to the Constitution was made.

6. The Board received into evidence the Constitution of the applicant, dated February 1994, and the Minutes of the Special Meeting at which certain amendments to the Constitution were made, dated August 3. The Board also heard the evidence of John Coones, president of the applicant.

7. It is asserted by Local 79 that the amendment is not effective because it was not done in accordance with the procedures established in the Constitution for constitutional amendments. Local 79 accepts that the Board should not be unduly technical in assessing whether the applicant has complied with its own procedures; however, it submits that even if the Board's concern is that there be "substantial compliance" with the applicant's internal procedures, these facts fail to meet that test. Neither the amendment to the Constitution permitting amendments to be made at Special Meetings, nor the amendment to the membership provision, are valid. The applicant's Constitution provides that constitutional amendments *must* be made at the Policy and Objectives Conference, which the Constitution requires be held annually between April 1 and May 30. This is more than a technical defect. Amendments to a Constitution are fundamental issues to a trade union, and particularly where the amendments deal with membership.

8. The applicant takes the position that the Board ought not be concerned with how the constitutional amendments were effected. The Board need only be satisfied that, having regard to the applicant's Constitution as it now reads, the applicant can accept into membership the persons whom it seeks to represent. In any case, the amendments were effected in accordance with the internal procedures set out in the Constitution. In the alternative, it is asserted that the amendments substantially comply with the applicant's internal procedures, and ought to be accepted by the Board as effective for the purposes of the certification application.

9. The parties referred the Board to a number of decisions of this Board, other tribunals and the courts, which we find it unnecessary to list or refer to here, since the main legal framework and propositions were uncontroversial.

10. We find it unnecessary to determine whether as a general matter the Board, for the purposes of a certification application, should inquire into the procedures applied by a union in amending its constitution so that it can accept into the membership the employees affected by that application. We also need not and do not determine whether the manner in which the amendments were effected comply in a technical or contractual sense with the terms of the Constitution. It is sufficient for our purposes that we have found the procedures invoked by this applicant to effect the amendment in question to be substantially consistent with its internal rules. If there were defects in the procedures, they are not so significant that they lead us to conclude that the applicant is unable to admit into membership the persons whom it seeks to represent.

11. In arriving at our conclusion, we have regard to the fact that the Executive body (consisting of about 45 delegates) which passed the motions on August 3 is identical to the body which is entitled to vote at the Policy and Objectives Conference. There is no dispute that had the motion been passed by this same group of delegates at the Policy and Objectives Conference, it would have been a valid constitutional amendment. Further, to the extent that certain procedures for the prior submission and compilation of resolutions to be presented to the Policy and Objectives Conference do not apply to a Special Meeting of the Executive, the absence of these procedures is not

determinative in the case before us. The procedures for the Policy and Objectives Conference do not provide such substantive rights to the members of the applicant that the differences between the way in which decisions are made at this Conference, and at a Special Meeting, are compelling for the purposes of our determination. Even with respect to the Policy and Objectives Conference, for instance, there is no mechanism for notice to members of proposed resolutions, or for discussion or consultation between the members and their delegates. Members attend the Conference as observers only, and upon receiving the approval of the Board of Directors.

12. The amendments were made in good faith, in response to a decision of the Board, and in support of organizing activities which had already been in place for some months. There is no evidence that these organizing activities are a matter of controversy within the applicant. The decision to effect the amendments at a Special Meeting was made having regard to the considerable delay that would result if the matter had waited until the next Policy and Objectives Conference in April or May of 1995, and the effect this delay would likely have on the employees in the proposed bargaining unit.

13. For these reasons, the Board concludes that the applicant is not precluded from admitting into membership the persons whom it seeks to represent and that the amendment to its Constitution is effective for the purpose of curing the defect to this application for certification found in the Board's prior decision.

14. The Board is indebted to the parties for their thorough and thoughtful submissions.

15. This panel is not seized.

1760-94-U Leonard A. Vaillant, Applicant v. Communications, Energy & Paperworkers' Union, Local 39, Responding Party v. Lakehead Newspaper Ltd., Intervenor

Duty of Fair Representation - Unfair Labour Practice - Board observing that in order to establish breach of duty of fair representation, complainant must demonstrate something more than fact that grievance did not go to arbitration or that he had some argument to make about how collective agreement might be applied to him - Complainant given 21 days to set out why his application should not be dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair.

DECISION OF THE BOARD; November 9, 1994

I

1. This is an application under section 91 of the *Labour Relations Act*, alleging a breach of section 69 of the Act. Section 69 reads as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. This application names Vic Baskin as the responding party. Strictly speaking an *individual* cannot contravene section 69, which applies only to trade unions. However, since a union official's behaviour may make *the union* liable under section 69, the title of this proceeding will be amended to name "Communications, Energy & Paperworkers' Union, Local 39" as the responding party.

II

3. The difficulty with this application is not the identity of the responding party, but rather whether the application makes out any case for a hearing at all at this stage. For if the complainant has not clearly crystallized his concern and made out a case for Board intervention, formal litigation may be premature.

4. There is no cost to file a complaint with the Ontario Labour Relations Board. The paperwork is less onerous than in the courts. A complainant need not engage a lawyer to prepare or present the allegations (although it is usually prudent to do so). The hearing (if there is one) is a little more relaxed. And the Board does not award "costs" - that is, it does not require a "losing party" to pay the legal (or other) costs of the "winner".

5. But this does not mean that the process is completely informal or that it is "free" to the parties or the public.

6. A formal hearing can generate significant unrecoverable costs, regardless of the outcome. The responding parties will often have to retain a lawyer to prepare their defence. They may also have to compile an elaborate reply, or arrange for the attendance of witnesses if the facts are disputed and the case proceeds to a hearing. None of those costs are recoverable, even if it turns out that the complaint is without merit.

7. And, of course, there is a public cost as well. Board resources are not unlimited. Resources that are devoted to the resolution of one claim are not available for others, which, in consequence, will have to wait - and that is a matter of real concern when the Board's caseload exceeds 4000 applications per year, each of which could go to a hearing. It is important that cases with merit proceed to a hearing as quickly and economically as possible. It is also important to identify and deal with cases that are not properly framed or do not make out a case.

8. Unlike some other tribunals (the Human Rights Commission, for example) the Board does not conduct its own investigation. Like a court, it receives the parties' evidence and representations, then makes a decision on the basis of the material before it. It is up to the parties to prepare and present their case.

9. But, because this litigation process can be costly for all concerned, it is important to clearly establish the basis for a claim *prior* to the commencement of the formal hearing process. It is also necessary to spell out the allegations in sufficient detail that the Board will be able to gauge the dimensions of the dispute, and the responding parties will understand the charges that are being made against them. That is why the Rules contain these provisions:

12. Any application filed with the Board must include the following details:

- (d) a detailed statement of all the material facts on which the applicant relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.

16. Where a party in a case intends to allege improper conduct by any person, he or she must do

so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, and when and where it happened, and the names of any persons said to have acted improperly.

17. An application or response may not be processed if it does not comply with these Rules.

18. The Board may decide an application without further notice to anyone who has not filed a document in the way required by these Rules.

20. No person will be allowed to present evidence or make any representations at any hearing about any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.

21. The Board may also require a person to provide any further information, document or thing that the Board considers may be relevant to a case.

24. Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing. In its decision, the Board will set out its reasons. The applicant may within twelve (12) days after being sent that decision request that the Board review its decision.

III

10. The applicant states that he is entitled to a retirement allowance *from the employer* in addition to the severance pay that he has already received from the employer. He claims that, because the union does not agree with him, and has not obtained this additional sum *from the employer*, it has contravened its duty under section 69 of the Act.

11. I have emphasized the words “*from the employer*” in the previous paragraph, because that is the primary focus of the applicant’s claim: that the employer has denied him a benefit to which he is entitled under the terms of the collective agreement. This complaint, however, is *against the union*; and, in that sense, it is derivative. The applicant contends that *the union* has broken the law because it has not pressed his claim against *the employer*.

12. The employer has not been named as a responding party in this case. Nor does an employer have any retirement allowance obligations under section 69, or any other provision of the *Labour Relations Act*. If Mr. Vaillant is entitled to both severance pay and a retirement allowance, it is because a collective agreement provides that he can receive both payments.

13. There seems to be no dispute that the applicant was an employee of Lakehead Newsprint Limited for many years. It is not disputed that he was laid off in 1992 for a period beyond the 12 months prescribed in article 18 of the collective agreement (which provides that an employee loses his seniority after 12 months on layoff). Nor is it disputed that in September 1993 the employer wrote to the applicant as follows:

This letter is to inform you that you have now been on layoff in excess of twelve (12) months and that your employment may be terminated by virtue of the operation of Article 18 of the Collective Agreement.

We wish to remind you, however, of the meeting in early May of this year wherein you were advised of your right to take early retirement and to receive a lump sum payment in accordance with Article 28 of the Collective Agreement.

Should you fail to elect to take early retirement and the lump sum payment calculated in accor-

dance with Article 28, your employment will be terminated by virtue of the operation of Article 18 and you will be paid termination pay in accordance with Article 26, in full satisfaction of all statutory and Collective Agreement obligations regarding termination pay. Please indicate whether you intend to take early retirement by September 17th, 1993, failing which you will be immediately terminated effective that date.

Vacation pay will be paid in September.

We regret having to do this but unfortunately our volume of business has still not returned to the point where we need additional help for an extended period of time.

14. As will be seen, in September 1993 the employer outlined the options which (in its view) were available to Mr. Vaillant in September 1993: he could elect termination in accordance with article 18 or he could elect early retirement in accordance with article 28. Mr. Vaillant elected termination and received gross termination pay in the sum of \$5,630.40. He did not claim at the time that he should receive both payments.

15. Articles 18 and 28 read as follows:

Article 18 - Seniority

18.01 Employees may acquire seniority by working three (3) months continuously for the Company, in which event the employee's seniority will date back to the commencement of his last employment of the Company.

18.02 Where an employee acquires seniority, his name shall be placed on the seniority list.

18.03 Seniority shall be broken for the following reasons:

- (a) If the employee quits.
- (b) If the employee is discharged and not reinstated through the grievance or arbitration procedure.
- (c) If the employee is absent from work without leave and fails to provide a reasonable excuse.
- (d) If the employee fails to return to work within three (3) working days after being notified to report for work, unless for reasons beyond the employee's control.
- (e) If he is laid off for a continuous period equal to the seniority he had acquired at the time of such layoff period or for a continuous period of twelve (12) months.

18.04 Any notice to any employee under this agreement may be given either personally (either directly or by telephone) or prepaid registered post addressed to the employee at his last address shown on the seniority list or on the payroll of the Company, and such notice [sic] shall be deemed to have been given when delivered to the postal authorities.

18.05 In all layoffs, the Company shall consider the skill and efficiency of the employee and where the Company is satisfied that as between two (2) or more employees these qualifications are relatively equal, preference shall be given to the employee with the greatest seniority. Following a layoff, re-hiring shall be executed conversely to the outlined layoff procedure. The Company agrees that all reasonable effort will be made to give employees as much advance notice of lay-off as possible.

18.06 A leave of absence may be granted at the discretion of the Company for such reasons as extended vacations, compassionate grounds, or any other reason deemed worthy by the Company.

Article 28 - Pension Plan

28.01 Effective November 1st 1987 the Group Pension Plan Group Contract No. GR10253 with the Prudential Assurance Company Limited which covers eligible employees of Lakehead Newsprint Limited was changed from a Group Defined Benefit Pension Plan to a new Group Defined Contribution Pension Plan (Money Purchase).

(a) When the Defined Benefit Plan was changed to a Defined Contribution Plan, an amount was determined by the actuaries as the amount of Pension for the participants at age 65 based on years of service and the contributions made by the individual member. When the adjustments had been made for over purchases and shortfall pension due to the members age, etc., to arrive at the Defined Pension under the terms of the former plan, and an improvement to the existing pensioners, there was still a surplus in the plan. This surplus was distributed on a pro-rata basis to the participants to increase their pensions at age 65 and has been guaranteed by Prudential. The Company has provided the Pension Entitlement that was guaranteed at age 65 to the existing members in our bargaining unit at age 60, without actuarial reduction for the benefits earned under the previous Defined Benefit Plan.

(b) Effective June 1, 1988, any employee in service who elects to retire early upon his attainment of age 60 or after, provided he has accumulated at least 20 years' continuous service, will receive a one time lump sum payment based on the following schedule:

Age 60 — \$20.83 per month times each full year of continuous service to a maximum of 30 years. Maximum payment \$7500.00.

Age 61 — \$16.83 per month times each full year of continuous service to a maximum of 30 years. Maximum payment \$6000.00.

Age 62 — \$12.50 per month times each full year of continuous service to a maximum of 30 years. Maximum payment \$4500.00.

Age 63 — \$8.34 per month times each full year of continuous service to a maximum of 30 years. Maximum payment \$3000.00.

Age 64 — \$4.17 per month times each full year of continuous service to a maximum of 30 years. Maximum payment \$1500.00.

Under the Money Purchase Plan, the Company has agreed to increase the contributions towards the new Plan to 4½%, provided the employees will also increase their contributions to 4½% effective July 1st, 1991, which will increase the pension available to the employee at age 60 or 65 or at any age in between when he elects to retire.

16. Mr. Vaillant now claims an additional sum from the employer in consequence of "early retirement" and when this sum was not forthcoming he filed the present complaint against the union.

17. I might note, however, that according to the union, Mr. Vaillant was invited to pick up a grievance form and file a grievance against the employer asserting his claim under the collective agreement. But as at the date of the reply (September 1994) he has not done so.

18. Since, a *successful* section 69 complaint of this kind normally leads only to a Board direction that the union proceed to arbitration with the employee's grievance, it is not at all clear what remedy might be available from the Board that is not already open to the applicant by his own efforts. On this basis alone, this application may be premature.

19. But quite apart from that, it is not at all clear that the complaint as framed establishes

any arguable case of a breach of section 69 of the Act - that is, even if what Mr. Vaillant says is true and provable, it does not follow that the union has acted in a manner that is "arbitrary, discriminatory, or in bad faith". The fact that Mr. Vaillant might disagree with the union's interpretation of the collective agreement, (or believes that in September 1993 he had a dual entitlement not an "option"), does not mean that the union has breached the statute.

20. In *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001, the Board had before it a complaint that is somewhat similar to the present one: an employee was unhappy that a trade union had not taken to arbitration a case which he thought was meritorious. This is what the Board said about the scope of section 60 (now section 69) of the Act:

It is clear that in order to establish a breach of section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

21. In other words, in order to establish a breach of the statutory duty, a complainant must demonstrate something more than the fact that his grievance did not go to arbitration or that he had some argument to make about the way in which the collective agreement might be applied to him. Indeed, a complainant must establish more than that the union is mistaken. A union may be "wrong" without in any way breaching the law - that is without being "arbitrary, discriminatory or in bad faith". And the Board's mandate under section 69 is to correct *abuse*, not *mistakes*.

22. The Board has consistently recognized that, in the normal course, a union is entitled to make judgements about how the negotiated terms of the agreement are meant to be applied; moreover most grievances do not go to arbitration. They are settled in the grievance procedure; and, a union may not file a grievance at all if it does not think there is a provable breach of the collective agreement.

23. There is nothing unusual (let alone "arbitrary" etc.) about a union's decision not to carry a claim forward, or not to pursue it to formal arbitration. That is what happens most of the time. That is what the grievance procedure is for: to sort out and assess claimed contraventions of the collective agreement.

24. In making decisions about the merits of an employee's claim, the union must form some judgement about whether the negotiated language of the collective agreement was intended to and does support the employer's or employee's interpretation, and whether the claim will be successful. A union's conclusion that the employer is "probably right" does not, in itself, establish any breach of the *Labour Relations Act* - even if there is something to be said for the employee's position as well. Nor is the union's disagreement with the employee's position necessarily unlawful - even if the union turns out to be wrong. Within limits, the union has a right to be wrong. Honest error is not illegal; nor is this Board a "Court of Appeal", with a broad mandate to reverse union decision making processes. The standard of review is that set out in *I.T.E. Industries* above.

25. A union is entitled to settle grievances, and in many cases should be doing so; moreover, because most employee grievances are settled without going to arbitration, it can hardly be said that there is an arguable case of illegality just because a matter is not arbitrated. And in the instant case, it appears that the applicant has not even filed a grievance yet.

26. On the basis of the material currently before the Board, it is difficult to see that the complainant has made out an arguable case for a breach of the Act or a basis for proceeding at this time.

27. Counsel for the responding party has requested that this application be dismissed, without a formal hearing.

28. The applicant will have 21 days from the date hereof to reply to counsel's request, and to set out why, in his submission, this application should not be dismissed.

2670-94-M Practical Nurses Federation of Ontario, Applicant v. 678114 Ontario Inc. c.o.b. as Vistamere Retirement Residence, Responding Party.

Change in Working Conditions - Interim Relief - Remedies - Unfair Labour Practice - Board directing employer to maintain present scheduling system on interim basis pending disposition of union's unfair labour practice application

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

APPEARANCES: *Denis Ellickson* and *Bill Sly* for the applicant; *Paul Jarvis*, *Tom Kitchen*, *Heather Chessman* and *Sally Hung* for the responding party.

DECISION OF LAURA TRACHUK, VICE-CHAIR, AND BOARD MEMBER C. McDONALD;
November 25, 1994

1. This is an application for an interim order under section 92.1 of the Act. On November 1, 1994 the Board (Board Member Pirrie dissenting) granted the application by directing the responding party "to maintain the present scheduling system on an interim basis pending the disposition of the main application" (in Board File No. 2669-94-U). The following are the reasons for the majority's decision.

Facts

2. The facts alleged and relied upon by the parties emerge from their filed materials, including declarations, and can be briefly summarized as follows.

3. The applicant (sometimes referred to in this decision as the "union") was certified to represent the registered practical nurses (RPN's) employed by the responding party (sometimes referred to in this decision as the "company") on April 21, 1994. The parties have had a number of meetings for the purposes of collective bargaining and some progress has been made.

4. On July 15 the applicant filed an application (Board File No. 1322-94-U) under section 91 of the Act alleging, among other things, that the responding party had violated section 81, known as the statutory freeze provision, by reducing the hours of the RPN's on the care wing. The applicant filed an application for interim relief (Board File No. 1321-94-M) along with the application. In a decision dated July 28, 1994 (written reasons given on September 7) [now reported at [1994] OLRB Rep. Sept. 1274], the Board (differently constituted) granted the application for

interim relief and directed the company “to forthwith revoke the new scheduling system (as reflected in the schedules for July 18-31 and August 1-14, 1994), and to reinstate the scheduling system in effect for Registered Practical Nurses prior to July 18, 1994, on an interim basis pending the disposition of the main application or further direction from the Board”. The parties then settled the main application on August 4 by agreeing to some reduction in the RPN hours although a lesser reduction than the company had originally imposed.

5. In a collective bargaining session on September 22 the company informed the union that it had been advised by the Fire Marshall that it had to close the care wing. However, at that meeting the company did not indicate what, if any, impact this closing would have on staffing. In a collective bargaining meeting on October 6 the company advised the union that closing the care wing would have a significant impact on staffing. By letter dated October 12 the union was advised that the RPN hours would be reduced to 240 hours bi-weekly. The company asked the union for proposals as to how this reduction was to be effected but the union replied that the reduction was a violation of the Act. Ultimately, the company proposed to lay off 6 part-time RPN's and reduce the hours of the others as of November 7.

6. The Vistamere Retirement Residence has a “residence wing” and a “care wing”. In theory, the residents in the “care wing” require more assistance than those in the “residence wing”. The company claims that the Oakville Fire Department and then the Fire Marshall advised it on August 3 and 4 respectively that it had to close the “care wing” because the residents there required more care than the company was licensed to provide. According to the company's declarations, the company and the Fire Department agreed on August 25 that the company could give the residents 60 days' notice. The union disputes that the company was required to close the care wing and therefore lay off RPN's as a result of orders from the Fire Department and/or Fire Marshall.

Submissions of the parties

7. The union submitted that it had an arguable case for both a violation of section 81 of the Act as well as for a breach of the parties' settlement which is a violation of the Act under section 91(7). It argued further that the balance of harm favoured it in this case because its ability to represent its members and negotiate a collective agreement was being undermined by these and the company's previous actions. This was not a “harm” which could subsequently be remedied.

8. The company submitted that the union may not have an arguable case because not every change in terms and conditions of employment is a violation of section 81. Furthermore, it argued, the settlement contemplated the possibility of a reduction in hours. The company submitted that if it was required to continue to employ the RPN's pending the outcome of the main application, it would have to pay them for performing work which did not exist. The company argued that this loss would be unrecoverable. It estimated the cost to be approximately \$3,120.00 bi-weekly. The company argued that this quantification and evidence of actual financial loss distinguished this situation from the one which was subject to the previous Board decision.

9. Both parties referred to the following decisions of the Board: *678114 Ontario Inc. c.o.b. as Vistamere Retirement Residence*, (September 7, 1994, as yet unreported); *Loeb Highland*, [1993] OLRB Rep. March 197; *William Nielsen Ltd.*, [1994] OLRB Rep. March 326; *Ombudsman Ontario*, [1994] OLRB Rep. July, 885; *Morrison Meat Packers*, [1993] OLRB Rep. April 358.

Decision

10. The relevant sections of the *Labour Relations Act* are as follows:

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

* * *

91.-(7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

* * *

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

11. The Board's approach has been to make two assessments in considering applications for interim relief. It assesses whether or not there is an arguable case of a violation of the Act. It also assesses whether the balance of harm lies in granting or not granting the requested relief (*Loeb Highland, supra, Vistamere Retirement Residence, supra, Morrison Meat Packers, supra, Ombudsman Ontario, supra, William Nielsen, supra*). This approach is also a useful one in the present circumstances.

12. The majority found on the basis of the materials filed that the applicant had made out an arguable case that the company had violated section 81(1) of the Act by deciding to lay off and reduce the hours of its RPN's. The union also made out an arguable case that the company had violated the Act by breaching the settlement the parties had entered on August 4.

13. The majority also found that the balance of harm favoured the applicant in these circumstances. In *Loeb Highland, supra*, the Board considered how the idea of "balance of harm" might be utilized in future cases as follows:

33. The importance of effective remedies, their general imperfection in labour relations, and the

corrosive effects of delay all serve to highlight the critical role interim relief has to play in this area. If harm is not easily cured after the fact, and if delay is critical, it makes some sense to emphasize preventing that harm at the earliest possible point. However, it must be recognized that preventing one harm, to a union applicant for example, may well have a harmful labour relations effect on a responding employer. This suggests that a general predisposition towards preventing harm, rather than curing it, applies to the interests of both parties. In other words, the Board must balance the harm to each party in considering whether to grant an interim order. As a result, rather than separating out the concept of irreparable harm which appears to be a poor fit with the Board's experience in remedial matters, and then proceeding to an examination of the balance of convenience, we find it more consonant with labour relations realities to adopt an approach where we consider both what harm may occur if an interim order is not granted, and what harm may occur if it is. This does not mean that the notion of irreparable harm is entirely irrelevant. It merely reduces it to one of a number of aspects of harm which the Board might consider in this area.

34. Of course, this leaves open to some extent the sort of harm we envision as relevant to this balancing process. Given the fact that this jurisprudence is in its infancy, it makes sense to allow the parameters of that harm to evolve in the context of concrete situations which will be presented to us. Suffice it to say at this point that balancing the harm to the parties is not an exercise which takes place in a vacuum, but rather in the context of the purposes and scheme of the Act, which also serve to provide definition for the type of harm we would find persuasive. It is also worth noting that the Board has more flexibility in crafting interim orders than it may in final remedies. Because they are temporary, and because they are not dependent on a finding of a violation, for example, the Board has the relative luxury to conceive of interim justice as an endeavour in problem-solving, rather than fault-finding.

14. In this case, the Board must consider that the application for interim relief is brought in the context of allegations that the company has violated section 81(1). The purpose of section 81(1) was usefully set out in another recent interim relief decision in *Beef Improvement Ontario Incorporated*, [1994] OLRB Rep. April 341 as follows:

15. Section 81 is a strict liability provision in that an employer or trade union need not be improperly motivated for its actions to be in breach of it (see *Beaver Electronics Ltd.*, [1974] OLRB Rep. March 120, *Kodak Canada Ltd.*, [1977] OLRB Rep. Aug. 517). Commonly referred to as a "freeze" provision, section 81(1) of the *Labour Relations Act* prohibits both an employer and the trade union which represents that employer's employees from altering anything which affects the employment of those employees after an appropriate notice to bargain has been given, unless its collective bargaining partner consents. The purpose of these provisions is to provide a stable point of departure for collective bargaining, thereby facilitating the collective bargaining process, by maintaining the working conditions and circumstances in place when the freeze is triggered. This serves to provide a fixed, though not necessarily static, basis for collective bargaining and operates to preclude the unilateral alteration of any bargainable aspect of the employment status quo which might give one party an advantage in negotiations.

16. Although the "freeze" label has stuck, it may be somewhat of a misnomer. The words of section 81(1) of the Act might be read to mean that there can be no change in anything which affects employment during the specified period. However, the Board has interpreted this provision as operating to preserve the pattern of employment which exists when it comes into effect, rather than specific terms, conditions or other circumstances of employment. Consequently, both the employer and the trade union continue to be entitled to operate within the parameters of the established pattern of employment. (see, for example, *Simpsons Limited*, [1985] OLRB Rep. April 594, *Mohawk Hospital Services Inc.*, [1993] OLRB Rep. Sept. 873).

17. The Board has taken a flexible, and purposive labour relations approach to the statutory freeze under the *Labour Relations Act*. Further, and as the language of section 81(1) itself suggests, there is nothing wrong or even unusual with an employer and trade union negotiating with respect to matters which are subject to the statutory freeze.

• • •

23. The other harm asserted by the applicant is a collective bargaining harm. In the Board's view, it is not accurate to say that the applicant is seeking to gain an advantage in collective bargaining through this interim proceeding. On the contrary, the applicant seeks to have the collective bargaining positions of the parties restored to what they were at the time of the transfer from the Crown to OSI and BIO respectively. That is what section 81(1) is all about; namely, providing a period during which there is a fixed and stable point of departure for collective bargaining. The scheme of the *Labour Relations Act* recognizes that a change in the terms, conditions or other circumstances of employment by one party can cause harm to collective bargaining position of the other party to a collective bargaining relationship. This is a significant labour relations harm.

24. The responding parties OSI and BIO submitted that this sort of collective bargaining harm need not be addressed in an interim proceeding and that collective bargaining can proceed, on other issues, pending the disposition of the main application. The Board does not agree. It is true that collective bargaining can take many routes, and that some items can often be bargained before and sometimes without reference to others. However, in the big picture, the starting point for bargaining can have a significant impact on what is given or taken in one area which can in turn affect what is given or taken in other areas. The statutory freeze is just that and it addresses situations which readily lend themselves to interim relief.

15. The parties in this case are engaged in collective bargaining and have made some, although limited, progress. If the company's actions are a violation of section 81(1), they may very well significantly and irremediably undermine the union's bargaining position and ability to represent its members. The granting of interim relief at this juncture will alleviate and may even eradicate such an effect. This is exactly the sort of situation in which this remedial tool ought to be used. There is very little to distinguish this situation from the earlier interim relief application brought by the union. At that time, the company was also saying it had to reduce hours as it had no need for its present staffing levels. In that decision, the majority stated as follows:

26. Moving to the balance of harm, the majority did not consider the individual harms asserted to be a basis for granting the interim relief requested. Indeed, individual harm will rarely provide a sufficient basis for interim relief. The Board's interim relief power is a labour relations tool in a labour relations statute. It is to be applied for labour relations reasons, not personal ones. However, the majority recognized, as the Board did in *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. April 358, that a collective bargaining relationship can be particularly sensitive or fragile in its early stages, especially during negotiations for a first collective agreement, both from the representation/trade union support perspective, and from a collective bargaining perspective.

27. This does not mean that interim relief will be appropriate in every first collective agreement situation. On both representation and collective bargaining issues, the applicant must satisfy the Board that it will suffer a substantial labour relations harm if the interim relief sought is not granted in circumstances where there is no countervailing or offsetting harm which the responding party will suffer if interim relief is granted. In the context of this application (and indeed most interim relief cases) where the responding party is the employer, it must be remembered that the employer retains the right to manage the workplace, except to the extent that it has bargained away that right and subject to the provisions of the *Labour Relations Act* or other legislation. Section 92.1 is not a licence for Board management of the workplace. It is a mechanism available for use, where necessary, to stabilize the labour relations situation pending an adjudication of a labour relations dispute.

28. The *Labour Relations Act* is legislation which interferes with or modifies an employer's right to operate its workplace as it sees fit. More specifically, provisions like section 65, 66, 67, and 71 prohibit an employer from interfering with the formation, selection or administration of a trade union, or from "targeting" employees because they are members or supporters of a trade union, or because they are otherwise exercising a right under the Act. Section 81 is a more direct interference with the employer's right to operate its workplace. During the period to which it applies, it prohibits an employer from altering any term, condition or privilege of employment without the consent of the trade union which represents the employees.

29. In this case, the two grievors were the two most senior bargaining unit employees and also the employee representatives of the applicant trade union. Despite Vistamere's assertion (in its June 28, 1994 letter) that it would consider "the seniority of all employees, their preference with regard to shifts, attempt to retain full-time positions and give all employees the opportunity to work some scheduled shifts", there was nothing before the Board in this case which indicated how these factors were applied either generally or specifically to the two grievors, or at all. In our view, the representation harm likely to be suffered by the applicant in the interim as a result was neither remote nor speculative. It is precisely the kind of harm which strikes at the heart of the protections of the *Labour Relations Act*, particularly in a first collective agreement situation.

30. Further, the scheduling changes implemented by Vistamere constitute a clear alteration of conditions of employment which have been and are the subject of collective bargaining between the parties. That is, these changes have altered the point of departure for collective bargaining. Again, this collective bargaining harm to the applicant in these circumstances is manifest.

31. On the other hand, the harm alleged by Vistamere is that it will be inconvenienced and incur unrecoverable expenses. There is nothing before the Board which indicated that the inconvenience to Vistamere would be substantial and mere inconvenience cannot counter the sort of labour relations harm likely to be suffered by the applicant in this case. Further, there was nothing in the materials before the Board which indicated what the unrecoverable expenses which Vistamere would incur if the interim relief sought was granted might be, or that these expenses would be substantial, particularly since the hearing of the main application was scheduled to begin on August 10, 1994 and continue day to day on Monday through Thursday until it is completed. In the result, the majority was satisfied that the balance of harm favoured the applicant and granted the interim relief sought as aforesaid.

16. In this case, the company has quantified in its declaration the financial loss it claims that it will suffer if it is not permitted to lay off the RPN's and reduce the hours as proposed. It asserts that this loss will be irreparable in that the Board will not require that it be compensated for the approximately \$3,120.00 bi-weekly it claims it will lose after November 7. (The hearing of the main application is scheduled to commence on November 16.) While the Board accepts that the company may incur a financial loss if it is required to continue employing more RPN's than it requires, the majority finds that that harm is outweighed by the significant labour relations harm the union may suffer if the layoffs and reduction of hours occur prior to the disposition of the main application.

17. For all of the above reasons, the majority granted the requested interim relief.

DECISION OF BOARD MEMBER R. W. PIRRIE; November 25, 1994

1. For the purposes of my dissent I will not comment on the "arguable case" test which the Board applies to interim order requests. Given that the Board assumes all the unions facts are true and provable and disregards all of the employers facts, I would simply observe that it is "no test".

2. My focus for dissent in this instance is the majority's decision to grant the relief requested by the union. The majority's decision focuses entirely on the potential harm the union may suffer if the order is not granted and ignores the very real unrecoverable financial harm to the employer by granting the order.

3. The union has been certified. It and the employer have engaged in collective bargaining. It has brought a previous complaint to the Labour Relations Board on behalf of its members. It has concluded a settlement of that complaint on behalf of its members. It has applied for conciliation, and if it is unable to obtain the terms and conditions in bargaining it wants for its members, it has available to it, for the asking, first contract arbitration. True at the end of the day the union

will represent fewer RPN's than when it was certified, but it will still have a representational role for the remaining RPN's.

4. By contrast, the cost of having to continue to employ RPN's pending the Board's decision on the merits of this case is one which the employer can never recover should the union fail in its section 91 complaint. Had the majority not granted the relief, and had the Board ultimately ruled the employer's decision was tainted by anti-union animus, the panel hearing the main section 91 complaint could have ordered some form of compensation. That is a remedy open to the Board.

5. I would observe that in the final resolution of this case the Board is limited in what it can order by way of remedy. A portion of the work done by the RPN's at Vistamere was in relation to Assisted Care residents. Vistamere is or will shortly be out of the Assisted Care business. Hence the need for fewer RPN hours. Regardless of the merits of the applicant's case, in the final analysis the Board cannot order Vistamere to get back into Assisted Care activity. It is for this reason I would not have sustained the status quo. If the employer was improperly motivated in withdrawing from this aspect of its business, the remedy cannot lie in the continued employment of RPN's it does not require.

6. I also dissent from that portion of the Board's decision which requires the employer to not only continue to pay the RPN's in question, but to have them physically at its place of business when there is no work available for them.

COURT PROCEEDINGS

0122-92-U (Court File No. 615/94) Deloitte & Touche Inc., in its capacity as Court Appointed Receiver and Manager of Ottawa Nursing Centre Nursing Home, and not in its personal capacity, Applicant v. Canadian Union of Public Employees, Local 1343

Judicial Review - Sale of a Business - Unfair Labour Practice - Respondent appointed by Ontario Court (General Division) as receiver and manager of nursing home in December 1991 - Union complaining that respondent failing to adhere to collective agreement between union and nursing home and refusing to bargain with union - Board finding respondent to be successor employer for purposes of the Act - Board remitting issues to parties for consideration and remaining seized - Receiver's application for judicial review dismissed by Divisional Court

Board decision reported at [1993] OLRB Rep. Feb. 109.

Ontario Court of Justice, Divisional Court, O'Brien, Bell and Moldaver JJ., November 14, 1994.

O'Brien J. (endorsement): In view of the applicant's delay in bringing this application, as well as the significant prejudice to the respondent, which the applicant has conceded cannot be undone, we decline to exercise our discretion to hear this application. In our view this application should not have been brought subsequent to the minutes of settlement and the order of Cunningham J. We agree with the position taken by counsel for the respondent that the bringing of this application was an abuse of process of this court.

In the circumstances, costs fixed on a solicitor client basis against the applicant in its personal capacity, not as court appointed receiver & manager, at \$5,000.00.

0204-91-G (Court File No. 359/92) E.S. Fox Limited, Applicant v. Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007 and Ontario Labour Relations Board, Respondents

Construction Industry - Construction Industry Grievance - - Judicial Review - Settlement - Labour-Management Relations Committee hearing grievance at Step 3 of grievance procedure and issuing decision - Union submitting that matter in dispute thereby settled pursuant to grievance procedure set out in collective agreement - Board upholding union's preliminary motion, concluding that grievance settled, and directing employer to comply with terms of settlement - Employer's application for judicial review dismissed by Divisional Court

Board decision reported at [1992] OLRB Rep. Jan. 29.

Ontario Court of Justice, Divisional Court, Hartt, O'Brien and Moldaver JJ., November 8, 1994.

O'Brien J. (endorsement): The OLRB found a settlement occurred during the course of dispute resolution procedure contained in a province wide agreement existing between the Union Council and the Contractor's Association of which the applicant was a member.

The OLRB concluded the grievance involved had been settled and directed the applicant to comply with that settlement.

The OLRB noted the applicant had willingly participated in that process on other occasions and had done so in this case.

The Board exercised its jurisdiction by interpreting the agreement before it. It did so in a reasonable manner.

The Board also interpreted its constituent statute in a reasonable manner. See *A.G. Canada v. PSAC*, [1993] 1 SCR 941 A 961-963 & *Dayco (Canada) Ltd. v. CAW-Canada* (1993) 2 SCR 230 A 260.

The application is dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1089-94-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Lakehead District Roman Catholic Separate School Board (Respondent) Unit: "all student support persons (Teacher Assistants) employed by The Lakehead District Roman Catholic Separate School Board, save and except supervisors, persons above the rank of supervisor, students, cooperative education placements and employees in bargaining units for which any trade union held bargaining rights as of the date of application, June 28, 1994" (80 employees in unit)

1266-94-R: Bakery, Confectionery and Tobacco Workers' International, Union Local 264 (Applicant) v. Thornhill Bakery Ltd. (Respondent) Unit: "all employees of Thornhill Bakery Ltd. in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office staff and driver salesman" (49 employees in unit)

1331-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Steff-Kim Corporation Limited (Respondent) Unit: "all employees of Steff-Kim Corporation Limited in the City of Ottawa, save and except Administrator, Assistant to the Administrator and a Nurse Supervisor" (18 employees in unit) (*Having regard to the agreement of the parties*)

1691-94-R: Christian Labour Association of Canada (Applicant) v. Lutheran Nursing Home (Owen Sound) (Respondent) v. Group of Employees (Objectors) Unit: "all employees of Lutheran Nursing Home (Owen Sound) in the City of Owen Sound, save and except supervisors, persons above the rank of supervisor, office, clerical and maintenance staff, persons employed in a cooperative education program and students employed during the school vacation period," (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1756-94-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hagi's Independent Living Services for Thunder Bay Inc. (Respondent) Unit: "all employees of Hagi's Independent Living Services For Thunder Bay Inc. working in or out of the Glenwood Division (170 W. Donald Street) in the City of Thunder Bay, save and except Co-ordinators and persons above the rank of Co-ordinator" (12 employees in unit) (*Having regard to the agreement of the parties*)

1786-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Impact Building Maintenance Services Limited (Respondent) Unit: "all employees of Impact Building Maintenance Services Limited engaged in cleaning at 315 and 325 Front Street West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (34 employees in unit) (*Having regard to the agreement of the parties*)

1792-94-R: Graphic Communications International Union, Local 517M (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent) v. The Windsor Newspaper Guild, Local 239 (Intervener) Unit: "all employees of The Windsor Star, A Division of Southam Inc., in its Electronic Pre-Press Department in the City of Windsor, save and except supervisors and persons above the rank of supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

1824-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. N.S. Enterprises Limited (Respondent) Unit: "all employees of N.S. Enterprises

Limited in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

1896-94-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Valley Refrigeration Limited (Respondent) Unit: "all electricians and electricians' apprentices in the employ of Valley Refrigeration Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Valley Refrigeration Ltd. in all sectors of the construction industry in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1903-94-R: United Food and Commercial Workers Union, Local 633 (Applicant) v. R.J. Chartrand Holdings Limited c.o.b. as Chartrand's Your Independent Grocer (Respondent) v. Group of Employees (Objectors) Unit: "all Meat Department employees of R.J. Chartrand Holdings Limited c.o.b. as Chartrand's Your Independent Grocer in the Town of New Liskeard, save and except Meat Manager and persons above the rank of Meat Manager" (8 employees in unit)

1951-94-R: Canadian Union of Professional Security Guards (Applicant) v. North American Security Services Inc. (Respondent) Unit: "all employees of North American Security Services Inc. in the Municipality of Metropolitan Toronto and the Town of Brampton - Bramalea, save and except Patrol Supervisors, persons above the rank of Patrol Supervisor, dispatch personnel, client service representatives, office and sales staff" (23 employees in unit) (*Having regard to the agreement of the parties*)

1975-94-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Domus Industries Ltd. (Respondent) Unit: "all journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers or fireproofing applicators in the employ of Domus Industries Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers or fireproofing applicators in the employ of Domus Industries Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"

1978-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent) Unit: "all employees of Hallmark Housekeeping Services Inc., engaged in cleaning at 21 College Street, in the City of Toronto, save and except working forepersons, persons above the rank of working foreperson, office, clerical and sales staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

1983-94-R: Amalgamated Clothing and Textile Workers Union, Ontario Joint Council (Applicant) v. Nise N Kosy Incorporated c.o.b. as The Incredible T-Shirt Company (Respondent) Unit: "all employees of Nise N Kosy Incorporated c.o.b. as The Incredible T-Shirt Company in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales staff, persons regularly employed for not more than 24 hours per week and students" (81 employees in unit) (*Having regard to the agreement of the parties*)

2032-94-R: United Steelworkers of America (Applicant) v. 1018433 Ontario Limited, c.o.b. as Michel's Baguette (Respondent) Unit: "all employees of 1018433 Ontario Limited, c.o.b. as Michel's Baguette at 50 Rideau Street in the City of Ottawa, save and except Managers, persons above the rank of Manager, office and clerical staff and supervisors" (32 employees in unit)

2051-94-R: Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC (Applicant) v. Golden Cat Limited (Respondent) Unit: "all employees of Golden Cat Limited in the Town of Caledonia, save and

except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (30 employees in unit) (*Having regard to the agreement of the parties*)

2059-94-R: London and District Service Workers’ Union, Local 220 (Applicant) v. Steeves and Rozema Enterprises Limited (Respondent) Unit: “all employees of Steeves & Rozema Enterprises Limited at 840 and 845 Trillium Park in the City of Sarnia, save and except supervisors and persons above the rank of supervisor” (18 employees in unit) (*Having regard to the agreement of the parties*)

2060-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Impact Building Maintenance Services Limited (Respondent) Unit: “all employees of Impact Building Maintenance Services Limited engaged in cleaning at 500 Consumers Road in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (12 employees in unit) (*Having regard to the agreement of the parties*)

2061-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Waste Management of Canada Inc. (Respondent) Unit: “all employees of Waste Management of Canada Inc. in the Counties of Essex and Kent, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (22 employees in unit) (*Having regard to the agreement of the parties*)

2131-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Armada Toolworks Ltd. (Respondent) v. Group of Employees (Objectors) Unit: “all employees of Armada Toolworks Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales, quality control, tool room and engineering staff” (105 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2149-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Potter Station Power Co. Inc. (Respondent) Unit: “all employees of Potter Station Power Co. Inc. in the District of Cochrane, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

2183-94-R: The Central of Independent Unions of the Automobile Industry of Ontario (Applicant) v. Canpark Services Ltd. (Respondent) Unit: “all employees of Canpark Services Ltd. in the Regional Municipality of Ottawa-Carleton, save and except City Manager, District Manager, office and clerical staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

2184-94-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Braids and Laces Limited (Respondent) Unit: “all employees of Braids and Laces Limited, at C21995 Durham Regional Road #23, in the Township of Brock, save and except supervisors, persons above the rank of supervisor, office, sales staff, students and homeworkers” (17 employees in unit)

2185-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Letwin Bros. Limited o/a Quigley Contracting (Respondent) Unit: “all employees of Letwin Bros. Limited o/a Quigley Contracting engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2186-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hartmut Wiens Electrical Contracting Limited (Respondent) Unit: “all employees of Hartmut Wiens Electrical Contracting Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors and construction labourers, and all employees of Hartmut Wiens Electrical Contracting Limited in all sectors of the construction industry in

the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors and construction labourers, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2204-94-R: Canadian Telephone Employees Association (Applicant) v. Tele-Direct (Publications) Inc. (Respondent) Unit: "all Direct Marketing Representatives of Tele-Direct (Publications) Inc. in the Regional Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

2209-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent) Unit: "all employees of Zellers Inc. at its store at 1245 Dupont Street, in the Municipality of Metropolitan Toronto, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officers, personnel clerks and students employed in a co-operative work program" (86 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2217-94-R: United Steelworkers of America (Applicant) v. Pembroke Civic Hospital (Respondent) v. The Association of Allied Health Professionals: Ontario (Intervener) Unit: "all employees of Pembroke Civic Hospital in the City of Pembroke, save and except Supervisors, persons above the rank of Supervisor, Accountant, Chief Engineer, Executive Secretary/Assistant to Executive Director, and persons for whom any trade union held bargaining rights as of September 30th, 1994" (114 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2230-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. A-Lert Canada Limited (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of A-Lert Canada Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and all ironworkers and ironworkers' apprentices in the employ of A-Lert Canada Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2245-94-R: United Steelworkers of America (Applicant) v. Hemlo Gold Mines Inc. (Respondent) Unit: "all employees of Hemlo Gold Mines Inc. located approximately 36.5 kilometres east of the Town of Marathon, save and except supervisors, persons above the rank of supervisor, office, clerical, technical, sales and security staff and students employed during the school vacation period" (224 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2260-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. AFP Communications (Respondent) Unit: "all employees of AFP Communications at and out of the Municipality of Metropolitan Toronto, save and except Manager and persons above the rank of Manager" (3 employees in unit) (*Having regard to the agreement of the parties*)

2265-94-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Melin Interior Systems Inc. (Respondent) Unit: "all painters and painters' apprentices in the employ of Melin Interior Systems Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Melin Interior Systems Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (*Clarity Note*: Painters in the above

bargaining unit include Drywall Tapers” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2266-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Canadian Corps of Commissionaires (Hamilton) (Respondent)

Unit: “all employees of the Canadian Corps of Commissionaires (Hamilton) employed at the Hamilton Board of Education Buildings at 100 Main Street West and 220 Dundurn Street, Hamilton, save and except Detachment Commanders and persons above the rank of Detachment Commander” (13 employees in unit) (*Having regard to the agreement of the parties*)

2279-94-R: United Steelworkers of America (Applicant) v. EMCO Window & Door Centre, a Division of EMCO Limited (Respondent) Unit: “all employees of EMCO Window & Door Centre, a Division of EMCO Limited in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (66 employees in unit) (*Having regard to the agreement of the parties*)

2301-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Display Fixtures, a Division of Westfair Foods Ltd. (Respondent) Unit: “all Journeymen and Apprentice Refrigeration and Air Conditioning Mechanics in the employ of Display Fixtures, a Division of Westfair Foods Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all Journeymen and Apprentice Refrigeration and Air Conditioning Mechanics in the employ of Display Fixtures, a Division of Westfair Foods Ltd. in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2304-94-R: The de Havilland Security Police Officers Association (Applicant) v. de Havilland Inc. (Respondent) v. United Steelworkers of America (Intervener) Unit: “all Security Police Officers employed by de Havilland Inc. in the Municipality of Metropolitan Toronto, save and except Sergeants and persons above the rank of Sergeant” (4 employees in unit) (*Having regard to the agreement of the parties*)

2305-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Careful Hand Laundry & Dry Cleaning Limited (Respondent) Unit: “all store clerks of Careful Hand Laundry & Dry Cleaning Limited in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and accounting staff and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2310-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hartmut Wiens Electrical Contracting Limited (Respondent) Unit: “all employees of Hartmut Wiens Electrical Contracting Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors and construction labourers, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2311-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Atlas Alloys, a Division of Rio Algom Limited (Respondent) Unit: “all employees of Atlas Alloys, a Division of Rio Algom Limited, in the Village of Point Edward, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

2319-94-R: United Steelworkers of America (Applicant) v. Wirral Manufacturing Ltd. (Respondent) Unit: “all employees of Wirral Manufacturing Ltd. in the City of Burlington, save and except supervisors, persons

above the rank of supervisor, engineers employed in a professional capacity, office, clerical and sales staff” (75 employees in unit) (*Having regard to the agreement of the parties*)

2336-94-R: United Steelworkers of America (Applicant) v. The Hudson’s Bay Company (Respondent) Unit: “all part-time security guards employed by The Hudson’s Bay Company, at its Bay store at 3030 Howard Avenue, in the City of Windsor, save and except supervisors, persons above the rank of supervisor, persons regularly employed for more than 24 hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university” (9 employees in unit) (*Having regard to the agreement of the parties*)

2349-94-R: Hospitality Employees, Service Employees Union of Canada (Applicant) v. 1003097 Ontario Limited (Respondent) Unit: “all employees of 1003097 Ontario Limited c.o.b. as D & P Cleaners at 78 Amherst Drive in the City of Kitchener, save and except supervisors and persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

2371-94-R: International Brotherhood of Painters and Allied Trades and Local Union 1819 (Glaziers) (Applicant) v. Can-Am Glass & Mirror Ltd. (Respondent) Unit: “all glaziers and glaziers’ apprentices in the employ of Can-Am Glass & Mirror Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all glaziers and glaziers’ apprentices in the employ of Can-Am Glass & Mirror Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2378-94-R: Canadian Union of Public Employees (Applicant) v. Rainycrest Home for the Aged (Respondent) Unit: “all employees of Rainycrest Home for the Aged working at or out of Fort Frances, Atikokan, Emo and Rainy River Home Support Offices, save and except Co-ordinators, persons above the rank of Co-ordinator, Administrative Assistant, Accounts Clerks and persons for whom any trade union held bargaining rights as of October 6, 1994” (29 employees in unit) (*Having regard to the agreement of the parties*)

2383-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Steveran Investment Company Limited c.o.b. as Sanitary Maintenance Systems and 549378 Ontario Limited c.o.b. as Sanitary Maintenance Systems (Respondent) Unit: “all employees of Steveran Investment Company Limited c.o.b. as Sanitary Maintenance Systems and 549378 Ontario Limited c.o.b. as Sanitary Maintenance Systems engaged in cleaning and maintenance at 22 St. Clair Avenue East in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, office and sales staff” (24 employees in unit) (*Having regard to the agreement of the parties*)

2384-94-R: Ontario Nurses’ Association (Applicant) v. Ridley College (Respondent) Unit: “all Registered and Graduate Nurses employed by Ridley College in the City of St. Catharines, save and except the Manager of Health Services and persons above the rank of the Manager of Health Services” (6 employees in unit) (*Having regard to the agreement of the parties*)

2391-94-R: United Steelworkers of America (Applicant) v. Fib-Pak Inc. (Respondent) Unit: “all employees of Fib-Pak Inc. in the Town of Vankleek Hill, save and except forepersons and persons above the rank of foreperson” (10 employees in unit) (*Having regard to the agreement of the parties*)

2396-94-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Minuk Contracting Inc. (Respondent) Unit: “all construction labourers in the employ of Minuk Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Minuk Contracting Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the indus-

trial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

2408-94-R: London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Corporation of the County of Grey (Respondent) Unit: “all employees of The Corporation of the County of Grey in its Home or Homes for the Aged in the Village of Markdale, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, employees regularly employed for not more than 24 hours per week, students employed during the school vacation period and office and clerical staff” (9 employees in unit) (*Having regard to the agreement of the parties*)

2409-94-R: IWA-Canada (Applicant) v. Unisource Canada, Inc. (Respondent) Unit: “all employees of Unisource Canada, Inc. at its Supply Systems Division in the City of Thunder Bay, save and except managers and persons above the rank of manager, office and sales staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

2418-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Les Ingenieries Consbec Inc. (Respondent) Unit: “all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the employ of Les Ingenieries Consbec Inc. in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2423-94-R: Ontario Public Service Employees Union (Applicant) v. Wallaceburg and Sydenham District Association for Community Living (Respondent) Unit: “all employees of Wallaceburg and Sydenham District Association for Community Living in the Town of Wallaceburg, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

2433-94-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. C.A.R.V. Masonry Inc. (Respondent) Unit: “all construction labourers in the employ of C.A.R.V. Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of C.A.R.V. Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2435-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Live Entertainment of Canada, Inc. (Respondent) Unit: “all employees of Live Entertainment of Canada, Inc. engaged in house-keeping and janitorial services at North York Performing Arts Centre, 5040 Yonge Street in the Municipality of Metropolitan Toronto, save and except non-working group leaders, persons above the rank of non-working group leader, office and sales staff” (29 employees in unit) (*Having regard to the agreement of the parties*)

2439-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Chatham - Kent, Ontario Branch (Respondent) Unit: “all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses Chatham - Kent, Ontario Branch in the County of Kent, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1866-94-R: London and District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Joseph’s Health Services Association of Sarnia, Incorporated, as owner and operator of St. Joseph’s Health Centre of Sarnia (Respondent) Unit: “all lay office and clerical employees of St. Joseph’s Health Services Association of Sarnia, Incorporated, as owner and operator of St. Joseph’s Health Centre of Sarnia, save and except Supervisors, persons above the rank of Supervisor, Accountant, Secretaries to the Executive Director, Secretaries to the Assistant Executive Directors, Human Resource Staff, Payroll Clerk,

Payroll Assistant, Buyer, persons regularly employed for not more than 24 hours per week and pending resolution by the Board, also excluding the Secretary of the Director of Finance” (43 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0392-94-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canac Kitchens Limited (Respondent) Unit: “all employees of Canac Kitchens Limited in the Town of Markham, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, installer and truck drivers” (391 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	467
Number of persons who cast ballots	453
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	432
Number of segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	274
Number of ballots marked against applicant	156
Number of ballots segregated and not counted	21

1428-94-R: United Steelworkers of America (Applicant) v. 608507 Ontario Inc. c.o.b. as Capital Security and Investigations (Respondent) Unit: “all employees of 608507 Ontario Inc. c.o.b. as Capital Security & Investigations in the Regional Municipality of Ottawa-Carleton, save and except Patrol Officers, persons above the rank of Patrol Officer, Dispatcher, office and clerical staff and persons regularly employed for not more than 24 hours per week” (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	5

1789-94-R: Ontario Public Service Employees Union (Applicant) v. Chatham Public General Hospital (Respondent) v. Group of Employees (Objectors) Unit: “all paramedical and technical employees of Chatham Public General Hospital in the City of Chatham, save and except supervisors, persons above the rank of supervisor, office and clerical staff and employees for which any trade union held bargaining rights as of August 19, 1994” (96 employees in unit)

Number of names of persons on revised voters' list	100
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Number of persons who cast ballots	86
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	82
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	35
Number of ballots segregated and not counted	4

Applications for Certification Dismissed Without Vote

1602-92-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Price Club St. Laurent Inc. c.o.b. as Price Club Westminster (Respondent)

0571-94-R: Association of GO Transit Enforcement Officers (Applicant) v. Toronto Area Transit Operating Authority (Respondent) v. Amalgamated Transit Union Local 1587 (Intervener)

2272-94-R: Canadian Union of Labour Employees (Applicant) v. Public Service Alliance of Canada (Respondent)

Applications for Certification Withdrawn

0948-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Alfa Contracting (Division of Roadex Construction Inc.) (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) v. Group of Employees (Objectors)

1677-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1316 (Applicant) v. Atlantic Drywall Ltd., Atlantic Drywall and Painting Ltd. (Respondent)

1709-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. G. W. Harkness Contracting Ltd. (Respondent)

1895-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Techaire Systems Canada Inc. (Respondent)

2047-94-R: Labourers' International Union of North America, Local 607 (Applicant) v. K-Var Timber Ltd. (Respondent)

2102-94-R: United Steelworkers of America (Applicant) v. A-1 Rent A Tool Ltd. (Respondent) v. Group of Employees (Objectors)

2129-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Browning-Ferris Industries Ltd. (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Intervener)

2135-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. JWS Manufacturing Inc., and 864420 Ontario Limited (Respondents)

2144-94-R: Canadian Union of Public Employees (Applicant) v. The Hospital for Sick Children (Respondent)

2200-94-R: United Steelworkers of America (Applicant) v. Ultra Metal Inc. (Respondent)

2238-94-R: United Steelworkers of America (Applicant) v. Grand & Toy Limited (Respondent)

2296-94-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canac Kitchens Limited (Respondent)

2340-94-R: Ontario Public Service Employees Union (Applicant) v. Aequitas Inc. c.o.b. Kitchener House Community Resource Centre (Respondent)

2434-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hallmark House-keeping Services Inc. (Respondent)

2443-94-R: Service Employees' Union, Local 210 (Applicant) v. United Food & Commercial Workers Local 459 (Respondent)

2456-94-R: Hospitality Employees, Service Employees Union of Canada (Applicant) v. 578994 Ontario Limited (Respondent) v. Hotel Employees Restaurant Employees Union Local 75, of the Hotel Employees Restaurant Employees International Union, AFL-CIO-CLC-OFL (Intervener)

2520-94-R: Hospitality Employees, Service Employees Union of Canada (Applicant) v. Restaunics Services (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

0986-93-R: Canadian Union of Public Employees, Local 1358 (Applicant) v. The Essex County Roman Catholic Separate School Board (Respondent) (*Endorsed Settlement*)

1781-94-R: Service de Sant des Soeurs de la Charit d'Ottawa/Sisters of Charity Ottawa Health Services (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

1793-94-R: Graphic Communications International Union, Local 517M (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent) (*Granted*)

2004-94-R: Canadian Union of Public Employees Local 1001 (Applicant) v. The University of Windsor (Respondent) (*Granted*)

2006-94-R: Teamsters Local Union 230, affiliated with the International Brotherhood of Teamsters (Applicant) v. Essroc Canada Inc. (Respondent) (*Withdrawn*)

2205-94-R: Canadian Telephone Employees Association (Applicant) v. Tele-Direct (Publications) Inc. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3583-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 222 (Applicant) v. Charterways Transportation Limited, The Corporation of the Town of Ajax (Respondents) (*Granted*)

1424-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Bayritz Construction Ltd. and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry, Sundial Bricklayers Inc. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Dismissed*)

3015-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Rockform Concrete Forming (London) Ltd., 134518 Canada Inc., 447774 Ontario Ltd. (Respondents) (*Granted*)

3115-93-R: Mount Royal Concrete Floor (Canada) Ltd. (Applicant) v. Water-Shed Industrial Roofing Limited, Brazeau & Mckissock Roofing, Brazeau Roofing, Gordon Mckissock Roofing, Toitures Gord, Mckissock Roofing, 1029869 Ontario Inc. c.o.b. as Brazeau & Mckissock Roofing or alternatively, Gordon Mckissock Roofing or in the Further alternative Brazeau Mckissock Roofing, Gordon Mckissock, Fern Brazeau,

2867389 Canada Inc. (Respondents) v. Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Intervener) (*Endorsed Settlement*)

3341-93-R: Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Applicant) v. Mount Royal Concrete Floor (Canada) Ltd., c.o.b. as Mount Royal Contracting, M.B. Contracting and D.M.B. Contracting (Respondent) (*Endorsed Settlement*)

3825-93-R: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Olivieri Masonry Limited Ottawa-Carleton Bricklaying and Masonry Limited, 1957 Masonry Inc. (Respondents) (*Granted*)

3973-93-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Ontario Pipe Trades Council) (Applicant) v. Hi-Grade Welding Co. Ltd. and Ro-Les Enterprises Limited (Respondents) (*Withdrawn*)

4076-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. All Point Cabling Inc. and/or A.P.C.I. Communications Inc. (Respondents) (*Endorsed Settlement*)

0172-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 880 (Applicant) v. A. & H. Bolt & Nut Company Ltd. carrying on business as The Fastener Centre and Goodwill Industries of Windsor Inc. (Respondents) (*Withdrawn*)

0521-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. W.A. Stephenson Construction Co. Ltd., W.A. Stephenson Mechanical Contractors (Ontario) Limited (Respondents) (*Endorsed Settlement*)

0801-94-R: The Millwright District Council of Ontario on its own behalf and on behalf of Local 1916 (Applicant) v. Tri-Corps Industrial Contractors, Industrial Labour Corps. Inc., Scotron Holdings Inc., Christman & Leitch Contractors Ltd., Christman & Associates Contractors Ltd. (Respondents) (*Dismissed*)

0849-94-R: Independent Canadian Transit Union and its Local 9 (Applicant) v. Sisters of Charity of Ottawa Health Service (Respondent) v. Independent Canadian Transit Union and its Local 6, Canadian Union of Public Employees, Local 3101 (Interveners) (*Granted*)

1323-94-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Norm's Erection Service Incorporated, Associated Installers Limited (Respondents) (*Endorsed Settlement*)

1408-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Stouffville Tank & Pipe Ltd., Yellow Jacket Welding Company Limited and Larry James Romanovich (Respondents) (*Withdrawn*)

1523-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. T.B. Kerr Construction Inc., and T.B. Kerr Construction Services Inc. (Respondents) (*Endorsed Settlement*)

2136-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. JWS Manufacturing Inc., and 864420 Ontario Limited (Respondents) (*Withdrawn*)

2220-94-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. General Interior Contracting (Windsor) Inc. and Lakeview Painting (1990) Limited (Respondents) (*Endorsed Settlement*)

2334-94-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Meadowcroft Holdings Inc. carrying on business as Execu-Care Nursing Services, Kitchener Meadowcroft Limited Partnership, 5M Management Services Limited (Respondents) (*Endorsed Settlement*)

2346-94-R: International Union of Elevator Constructors, Local 50 (Applicant) v. Adco Elevator Service Ltd. and Phoenix Elevator Inc. (Respondent) (*Endorsed Settlement*)

SALE OF A BUSINESS

3584-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 222 (Applicant) v. Charterways Transportation Limited, The Corporation of the Town of Ajax (Respondents) (*Granted*)

1424-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Bayritz Construction Ltd. and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry, Sundial Bricklayers Inc. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Dismissed*)

3015-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Rockform Concrete Forming (London) Ltd., 134518 Canada Inc., 447774 Ontario Ltd. (Respondents) (*Granted*)

3084-93-R: IWA Canada, Local 2693 (Applicant) v. Long Lake Forest Products Inc. and Kimberly Clark Forest Products Inc. (Respondents) v. Ginoogaming First Nation Community Centre, Long Lake Employees Association, (Interveners) (*Granted*)

3115-93-R: Mount Royal Concrete Floor (Canada) Ltd. (Applicant) v. Water-Shed Industrial Roofing Limited, Brazeau & Mckissock Roofing, Brazeau Roofing, Gordon Mckissock Roofing, Toitures Gord, Mckissock Roofing, 1029869 Ontario Inc. c.o.b. as Brazeau & Mckissock Roofing or alternatively, Gordon Mckissock Roofing or in the Further alternative Brazeau Mckissock Roofing, Gordon Mckissock, Fern Brazeau, 2867389 Canada Inc. (Respondents) v. Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Intervener) (*Endorsed Settlement*)

3341-93-R: Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Applicant) v. Mount Royal Concrete Floor (Canada) Ltd., c.o.b. as Mount Royal Contracting, M.B. Contracting and D.M.B. Contracting (Respondent) (*Endorsed Settlement*)

3374-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. Duron Ottawa Ltd.; Conite Ltd., and 694280 Ontario Inc. c.o.b. as Conite (Respondents) (*Granted*)

3825-93-R: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Olivieri Masonry Limited Ottawa-Carleton Bricklaying and Masonry Limited, 1957 Masonry Inc. (Respondents) (*Granted*)

3973-93-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Ontario Pipe Trades Council) (Applicant) v. Hi-Grade Welding Co. Ltd. and Ro-Les Enterprises Limited (Respondents) (*Withdrawn*)

4076-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. All Point Cabling Inc. and/or, A.P.C.I. Communications Inc. (Respondents) (*Endorsed Settlement*)

4192-93-R: United Steelworkers of America (Applicant) v. Oryx Fixtures Inc. (Respondent) (*Granted*)

0041-94-R; 0042-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. MacLean Hunter Communications Inc. and Rogers Communications Inc. and Rogers Cantel Mobile Inc. (Respondents) (*Withdrawn*)

0172-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 880 (Applicant) v. A. & H. Bolt & Nut Company Ltd. carrying on business as The Fastener Centre and Goodwill Industries of Windsor Inc. (Respondents) (*Withdrawn*)

0521-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. W.A.

Stephenson Construction Co. Ltd., W.A. Stephenson Mechanical Contractors (Ontario) Limited (Respondents) (*Endorsed Settlement*)

0671-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. St. James Town Management Corporation Limited and Lilsam Inc. (Respondents) (*Withdrawn*)

0801-94-R: The Millwright District Council of Ontario on its own behalf and on behalf of Local 1916 (Applicant) v. Tri-Corps Industrial Contractors, Industrial Labour Corps. Inc., Scotron Holdings Inc., Christman & Leitch Contractors Ltd., Christman & Associates Contractors Ltd. (Respondents) (*Dismissed*)

0849-94-R: Independent Canadian Transit Union and its Local 9 (Applicant) v. Sisters of Charity of Ottawa Health Service (Respondent) v. Independent Canadian Transit Union and its Local 6, Canadian Union of Public Employees, Local 3101 (Intervenors) (*Granted*)

1323-94-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Norm's Erection Service Incorporated, Associated Installers Limited (Respondents) (*Endorsed Settlement*)

1408-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Stouffville Tank & Pipe Ltd., Yellow Jacket Welding Company Limited and Larry James Romanovich (Respondents) (*Withdrawn*)

1523-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. T.B. Kerr Construction Inc., and T.B. Kerr Construction Services Inc. (Respondents) (*Endorsed Settlement*)

1543-94-R: Hotel-Dieu Grace Hospital (Applicant) v. Canadian Union of Operating Engineers and General Workers Local 100, and Christian Labour Association of Canada (Respondents) (*Endorsed Settlement*)

2136-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. JWS Manufacturing Inc., and 864420 Ontario Limited (Respondents) (*Withdrawn*)

2220-94-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. General Interior Contracting (Windsor) Inc. and Lakeview Painting (1990) Limited (Respondents) (*Endorsed Settlement*)

2346-94-R: International Union of Elevator Constructors, Local 50 (Applicant) v. Adco Elevator Service Ltd. and Phoenix Elevator Inc. (Respondent) (*Endorsed Settlement*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2412-94-R: Canadian Union of Public Employees (Applicant) v. Children's Aid Society of Haldimand-Norfolk (Respondent) (*Granted*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

3770-93-R: Ensign Security Services Inc. (Applicant) v. United Steelworkers of America, and Canadian Security Union (Respondents) v. Pinkerton's of Canada Limited and Burns International Security Services Limited, Canadian Union of Professional Security-Guards (CUPS) (Intervenors) (*Dismissed*)

4054-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 880 (Applicant) v. Federal Industries Limited, Motorways (1980) Limited, Kingsway Transports Limited, Cabano Transport Inc., Cabano-Kingsway Transport Inc. and London Cartage & Delivery Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0572-94-R: Association of GO Transit Enforcement Officers (Applicant) v. Amalgamated Transit Union, Local 1587 (Respondent) v. Toronto Area Transit Operating Authority (Intervener) (*Dismissed*)

1505-94-R: Rose Gabrielli (Applicant) v. United Food and Commercial Workers, Local 206 (Respondent) v. 1032544 Ontario Inc. (Intervener) Unit: "all employees of 1032544 Ontario Inc., at 20 Valley Golf & Country Club, Vineland, Ontario and at Grimsby Curling Club, Grimsby, Ontario, save and except Manager and persons above the rank of Manager" (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	10

1837-94-R: Garage Workers Maple Lodge Farms Ltd. (Applicant) v. United Food and Commercial Workers International Union, Local 175, AFL-CIO-CLC (Respondent) v. Maple Lodge Farms Ltd. (Intervener) Unit: "all employees of Maple Lodge Farms Ltd. employed in its garage at R.R.#2, Norval, Ontario, save and except General Garage Foreman, persons above the rank of General Garage Foreman, Driver Trainer and office and clerical staff" (30 employees in unit) (*Dismissed*)

2125-94-R: Sonya ter Stege (Applicant) v. Ontario Public Service Employees Union (OPSEU) (Respondent) v. Meaford Beaver Valley Community Support Services (Intervener) (*Dismissed*)

2207-94-R: The Employee's of Tatro Equipment Sales Ltd. (Applicant) v. International Union, United Automobile Aerospace & Agricultural Implement Workers of America (Respondent) v. Tatro Equipment Sales Ltd. (Intervener) (*Granted*)

2294-94-R: Ellen M. Bates (Applicant) v. United Plant Guard Workers of America (Local 1956) (Respondent) v. Scott D. Avery (Company) Ltd. (Intervener) (*Grant d*)

2369-94-R: Andre Gharib (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) and its Local 195, CAW (Respondent) v. Kehl Tools Ltd. (Intervener) (*Withdrawn*)

REFERRAL FROM MINISTER (SECTION 109)

1855-94-M: Teamsters Local 419, Affiliated with the International Brotherhood of Teamsters (Applicant) v. Confederation Freezers Limited, a Division of Sterling Packers Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0954-94-U: Toronto Housing Labour Bureau (Applicant) v. Labourers International Union of North America, Local 183, Tony Dionisio and Michael J. Reilly (Respondent) (*Withdrawn*)

2532-94-U: Asea Brown Boveri Inc. (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555, Dennis Braun, Numi Broadfoot, Lorenzo Serravalle and Mark Willie (Respondents) (*Endorsed Settlement*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

1729-94-U: IWA-Canada, Local 1-2693 (Applicant) v. Goulard Lumber (1971) Limited (Respondent) (*Dismissed*)

2083-94-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services at Queen's University (Respondent) (*Endorsed Settlement*)

2173-94-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services at Queen's University (Respondent) (*Withdrawn*)

2202-94-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services at Queen's University (Respondent) (*Granted*)

2453-94-U: Ontario Public Service Employees' Union, Ontario Public Service Employees' Union, Local 225 (Applicant) v. Harc Inc. (Respondent) (*Withdrawn*)

2490-94-M: Marriott Corporation of Canada (Applicant) v. Ontario Public Service Employees Union, Local 241, Ontario Public Service Employees Union (Respondents) v. Mohawk College of Applied Arts & Technology (Intervener) (*Dismissed*)

2658-94-U: Ontario Public Service Employees' Union, Local 593 (Applicant) v. The Clarendon Foundation (Cheshire Homes) Inc. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0687-91-U: Shelley Steimer (Applicant) v. United Food & Commercial Workers Union, Local 175/633 (Respondent) (*Terminated*)

1467-92-U; 1615-92-U: United Food & Commercial Workers Union, Local 175 (Applicant) v. Price Club St. Laurent Inc. c.o.b. as Price Club Westminster (Respondent) (*Dismissed*)

3027-92-U: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicants) v. Labourers' International Union of North America, Local 183, Bricklayers Masons Independent Union of Canada Local 1, Metropolitan Toronto Apartment Builders Association (Respondents) (*Withdrawn*)

0901-93-U: Gordon Demianchuk (Applicant) v. Amalgamated Transit Union Local 113 (Respondent) v. The Toronto Transit Commission (Intervener) (*Dismissed*)

1984-93-U: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and The Ontario Provincial Conference of Bricklayers and Allied Craftsmen (Applicants) v. Bayritz Construction Ltd. and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry and Sundial Bricklayers Inc. and Labourers' International Union of North America, Local 183 (Respondents) (*Dismissed*)

2065-93-U: Hotel and Restaurant Employees Union, Local 75 (Applicant) v. Luis Foods Ltd. (Respondent) (*Terminated*)

2984-93-U: Maureen Colistro (Applicant) v. Ontario Nurses Association (Respondent) (*Dismissed*)

3962-93-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Banlake Associates Ltd. c.o.b. as Bancroft I.G.A. (Respondent) (*Withdrawn*)

4111-93-U: Lisa Newman (Applicant) v. Association of Allied Health Professionals of Ontario (Respondent) v. Baycrest Centre for Geriatric Care (Intervener) (*Withdrawn*)

4463-93-U: Association of Allied Health Professionals of Ontario (Applicant) v. Baycrest Centre for Geriatric Care (Respondent) (*Withdrawn*)

0074-94-U: International Beverage Dispensers' & Bartenders' Union, Local 280 (Applicant) v. Genosha Hotel (Oshawa) (Respondent) (*Withdrawn*)

0427-94-U: Doffy Hahn (Applicant) v. Badlands, Randy Filby, Albert Davies, Alek Korn (Respondents) (*Withdrawn*)

0461-94-U: United Brotherhood of Carpenters and Joiners of America and Local 1988, United Brotherhood of Carpenters and Joiners of America (Applicant) v. W.D. LaFlamme Limited, Greylieth Engineering Inc. (Respondents) (*Withdrawn*)

0467-94-U: Kathleen Lee (Applicant) v. Dan LaCroix: United Food and Commercial Workers International Union, Local 175 (Respondent) v. Loblaw's Supermarkets Limited (Intervener) (*Withdrawn*)

0507-94-U: Ronald C. Hodgson (Applicant) v. Canadian Autoworkers Union Local 222 (Respondent) v. General Motors of Canada Limited (Intervener) (*Withdrawn*)

0582-94-U: Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions including Local 527 (Applicant) v. Ken Scharf Construction Limited (Respondent) (*Withdrawn*)

0682-94-U: Ontario Public Service Employees Union (Applicant) v. Muki Baum Association for the Rehabilitation of Multi-Handicapped Inc. (Respondent) (*Granted*)

0867-94-U: International Association of Machinists and Aerospace Workers Local Lodge 717T (Applicant) v. Hawker Siddeley Canada Inc., Orenda Division (Respondent) (*Dismissed*)

0951-94-U: C.A.W. Local 444 Marine Division (Applicant) v. Clearwater Fisheries (1993) Inc. (Respondent) (*Dismissed*)

0990-94-U: Service Employees International Union, Local 532 (Applicant) v. Guelph Rest Home Inc. c.o.b. as Heritage House Retirement Home (Respondent) (*Withdrawn*)

1017-94-U: Labourers' International Union of North America, Local 183 (Applicant) v. Residential Framing Contractors' Association of Metropolitan Toronto & Vicinity Inc., Carlo D'Ambrosio, 684904 Ontario Limited, Joe Mazzobello, All Star Carpentry (1989) Ltd., Vince Leto and Ana Leto, 952002 Ontario Limited, Almicar Marques, Bellin Construction Ltd., Aldo Bellinaso, Benfica Construction Ltd., Jose Lourenco, Bluestream Investment (1985) Inc., Frank Zoratto, Bora Investment Ltd., Richard Mazobello, Cana Star Enterprises Ltd., Doady Odorico, Cancian Construction Ltd., Elio Cancian, Corrado Carpenter Contract. Ltd., Corrado Sciovoletti, 480320 Ontario Ltd. and Creative Carpentry, Joe Quattrin, F.E.D. Construction Limited, Fernando Fiorini and Domenic Fiorini, Fred Gatto Construction Ltd., Fred Gatto, Harbour Carpentry, John Pugliese, Joseph Schmidt Carpentry Ltd., Joe Schmidt, Keele Carpentry Limited, N. Fattore, Laskay Construction, Donato D'Alimonte, Lucien Carpenters Ltd., Gimmo Francescomi, P.G.A. Carpentry Ltd., Umberto Paglia, P.S. Carpentry Company Ltd., Nicola Pileggi, Petermar Carpentry Inc., P. Cipriano, Primarco Carpentry Inc., Primo Fantini, Raf-Tar Construction Inc., Ralph Burella and Steve Stefano, S. H. Carpentry Limited, Helmut Schmidt, Silver Leaf Carpentry Ltd., Benito Chiaravallotti, Silverwood Carpentry Inc., Joe Rubino, Sirena Construction Co. Ltd., Bruno Cornaviera, Trigar Construction Inc., Ralph Burella, Trilake Carpentry Ltd., Rocco Montemarano, Two Star Carpentry Inc., Rino DePiero, Unified Carpentry, Carlo Mofalto, Vision Carpentry Ltd., Tony Colacci and Angelo Colacci, York Framing Inc., Dennis Gubert, Capelas Homes Ltd., Carlos Bothelo, Errowood Construction Ltd., Guido Prosdocimo, 986506 Ontario Ltd./Executive Constr., Paul Bigioni, G M S N Construction Ltd., Giovanni Frisoni, Generation Carpentry Constr., Vince Leto and Tony Leto, Jolly Carpentry, Joe Piazza, Lucky Carpentry, Frank Patrizi, Lumar Construction Ltd., Manuel Pereira and Eulalia Pereira, Man Bros. Carpentry Inc., Aldo Manias, Maplewood Carpentry Inc., Mauro Rizzardo, Mario Skara Construction Ltd., Mario Skara, North York Construction

Ltd., Amerigo Lombardi, P.S. Carpentry Company Ltd., Nicola Pileggi, Pineridge Constr. (1986) Ltd., Coso Rizzo, Regal Carpentry Contrs. Ltd., Giovanni Covre, Ritmar Construction Ltd., Peter Miranni, Tolin Construction Inc., Tony Gargaro, Valentine Contractors Ltd., Erik Innis, Vantage Carpentry Ltd., Carlo Persichetti, W.G. Carpentry, William Graham, Westside Carpentry Ltd., Walter Turner (Respondents) (*Withdrawn*)

1023-94-U: James Thomson (Applicant) v. Teamsters Local Union No. 230 (Respondent) (*Dismissed*)

1064-94-U: Joanne Hollinsky (Applicant) v. Rita Hess - Union Steward CUPE 543 (Huron Lodge) (Respondent) (*Dismissed*)

1160-94-U: Birchmere Retirement Residence (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

1175-94-U: Chris Currie also 31 other applicants attached on separate page (Applicant) v. Labourers International Union of North America Local 506 (Respondent) v. The Board of Governors of Exhibition Place (Intervener) (*Dismissed*)

1289-94-U: Michael Mohr (Applicant) v. Pat Clancy, (National C.A.W.) (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)

1310-94-U: Teamsters Local Union 230, affiliated with the International Brotherhood of Teamsters (Applicant) v. Essroc Canada Inc. (Respondent) (*Withdrawn*)

1319-94-U: Kishlay Mukerjee (Applicant) v. Local 260 G of ABG International, Consumers Glass (Respondents) (*Dismissed*)

1388-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent) (*Withdrawn*)

1531-94-U; 1939-94-U: Asha Dave (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351; Workwear Corporation of Canada Ltd. (Respondent) (*Withdrawn*)

1533-94-U: IWA-Canada, Local 1-2693, and Leo LaFleur (Applicants) v. Goulard Lumber (1971) Limited, Mark Goulard and Romeo Goulard (Respondents) (*Dismissed*)

1619-94-U; 2241-94-U: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Superior Laminated Products Co. Limited (Respondent); United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Superior Laminated Co. Ltd. (Respondent) (*Withdrawn*)

1683-94-U: IWA-Canada, Local 1-2995 (requérant) c. 795651 Ontario Inc. fonctionnant sous le nom Le Nord et Omer Cantin (intimés) (*Withdrawn*)

1712-94-U: Peterborough Typographical Union, Local 248 (Applicant) v. The Peterborough Examiner (Respondent) (*Withdrawn*)

1750-94-U: George Murray (Applicant) v. Canadian Union of Public Employees and its Local 2544 (Respondent) v. Peel Board of Education (Intervener) (*Withdrawn*)

1764-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Armada Toolworks Ltd. (Respondent) (*Withdrawn*)

1840-94-U: Edwin L. Micallef (Applicant) v. Mr. Larry O'Keeffe, President, Local 29 C.A.W. (Respondent) (*Withdrawn*)

1847-94-U: Jose Mario Nunes (Applicant) v. Amalgamated Clothing and Textile Workers Union, Xerographic Division, Local 1414H, and Xerox Canada Ltd. (CRC-T) (Respondents) (*Withdrawn*)

1864-94-U: Luc Aubrey (Applicant) v. United Food & Commercial Workers International Union, Local Unions 175 and 633 (Respondent) (*Withdrawn*)

1868-94-U: Frances Fabian (Applicant) v. London and District Service Workers' Union, Local 220 (Respondent) v. Victoria Hospital Corporation (Intervener) (*Dismissed*)

1882-94-U: Ontario Public Service Employees Union (Applicant) v. Meaford - Beaver Valley Community Support Services (Respondent) (*Granted*)

1883-94-U: Ontario Public Service Employees Union (Applicant) v. Meaford - Beaver Valley Community Support Services (Respondent) (*Withdrawn*)

1914-94-U: Service Employees' Union, Local 210 (Applicant) v. Chateau Park Nursing Home (Respondent) (*Withdrawn*)

1915-94-U: Yvonne Mills (Applicant) v. Journey's End Motel, Gerry Chittle (Respondents) v. United Food and Commercial Workers International Union Local 175 (Intervener) (*Withdrawn*)

1963-94-U: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Domus Industries Ltd. (Respondent) (*Granted*)

1982-94-U: Wilson Ameduadzi (Applicant) v. Graphic Communications International Union, Local N-1 (Respondent) v. Atlantic Packaging Products Ltd. (Intervener) (*Withdrawn*)

1997-94-U: International Union of Elevator Constructors, Local 50 (Applicant) v. Phoenix Elevator Inc. (Respondent) (*Endorsed Settlement*)

2028-94-U: International Brotherhood of Electrical Workers, Local Union 1230 (Applicant) v. Walkerville Rest Home (Respondent) v. Diversicare Management Services (Intervener) (*Withdrawn*)

2034-94-U: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. National Masonry Inc., Antonio Palladino, Phillip De Lorenzo, Antonio Spagnoli (Respondent) (*Withdrawn*)

2041-94-U: Jackileen R. Rains (Applicant) v. United Steelworkers of America, Local Union 2251 (Respondent) (*Withdrawn*)

2046-94-U: Joanne Thibault (Applicant) v. Harry Sutton, UFCW Local 175 (Respondent) (*Dismissed*)

2079-94-U: ICM Krebsoge Unionized Workers, Phil Zellman, et al (Applicant) v. Negotiating Committee - International Association of Machinists, Local 1975, District 184 (Respondent) (*Withdrawn*)

2096-94-U: Christian Labour Association of Canada (Applicant) v. Rosanne Gillard and Sandra Marshall (Respondent) (*Withdrawn*)

2109-94-U: Godfrey E. Grimes (Applicant) v. International Brotherhood of Electrical Workers, System Council Number 34 (Respondent) (*Dismissed*)

2112-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Insulec Limited (Respondent) (*Terminated*)

2121-94-U: Kenneth Do (Applicant) v. Paul Pellettier, Executive Officer, Southern Ontario Newspaper Guild (Respondent) (*Withdrawn*)

- 2126-94-U:** Marriott Management Services at Queen's University (Applicant) v. Canadian Union of Public Employees and its Local 229 (Respondent) (*Dismissed*)
- 2141-94-U:** Hugh Scott (Applicant) v. American Standard (Respondent) (*Withdrawn*)
- 2168-94-U:** Leroy Hibbert (Applicant) v. International Brotherhood of Teamsters, Local No. 419 and High Tech Express & Distribution Inc. (Respondents) (*Withdrawn*)
- 2179-94-U:** Gilles Groleau (Applicant) v. Local 463 Board of Trustees Benefit Administration (Respondent) (*Dismissed*)
- 2210-94-U:** Russel Gray (Applicant) v. Metropolitan Toronto Civic Employees Union, Local 43 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Withdrawn*)
- 2213-94-U:** Barbara K. Gilmour (Applicant) v. Executive Committee, Canada Union of Public Employees (C.U.P.E.) Local 1883 (Respondent) (*Withdrawn*)
- 2216-94-U:** The Ontario Secondary School Teachers' Federation (Applicant) v. The Norfolk Board of Education, Rick Smith, Robert Scott and Gerald Drinkwater (Respondent) (*Endorsed Settlement*)
- 2246-94-U:** IWA-Canada (Applicant) v. Gilles R. Mayer Sanitation Ltée. (Respondent) (*Withdrawn*)
- 2247-94-U:** Christopher Kay (Applicant) v. Hotel, Motel and Restaurant Employees Union, Local 442 (AFL-CIO, CLC) (Respondent) (*Withdrawn*)
- 2249-94-U:** Gamal Ayad Zikry (Applicant) v. U.A. Local 787, Black & McDonald (Respondents) (*Withdrawn*)
- 2259-94-U:** Mr. Joe Di Turi (Applicant) v. The Canadian Union of Public Employees CUPE Local 3252 (Respondent) (*Withdrawn*)
- 2261-94-U:** The Ontario Secondary School Teachers' Federation (Applicant) v. The Norfolk Board of Education, Rick Smith, Robert Scott and Gerald Drinkwater (Respondent) (*Endorsed Settlement*)
- 2264-94-U:** Alpheus Pryce and Mrs. C. Giancola (Applicants) v. Imperial Feather Corp. Torferco/Amalgamated Clothing & Textile Workers Union (Respondents) (*Dismissed*)
- 2277-94-U:** International Brotherhood of Electrical Workers' Local Union, 773 (Applicant) v. Moncur Electric Motors Ltd. (Respondent) (*Withdrawn*)
- 2297-94-U:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canac Kitchens Limited (Respondent) (*Withdrawn*)
- 2300-94-U:** Textile Processors, Service Trades Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Holiday Inns of Canada Limited c.o.b. as Crowne Plaza Toronto Centre (Respondent) (*Withdrawn*)
- 2329-94-U:** United Steelworkers of America (Applicant) v. Peel Paper Products Ltd. (Respondent) (*Withdrawn*)
- 2351-94-U:** Amalgamated Clothing and Textile Workers Union (Applicant) v. Braids & Laces Limited (Respondent) (*Withdrawn*)
- 2389-94-U:** Francis Nadarajah (Applicant) v. Marriott Eaton Centre (Respondent) (*Dismissed*)
- 2397-94-U:** Labourers' International Union of North America, Local 506 (Applicant) v. Minuk Contracting Inc. (Respondent) (*Withdrawn*)

2404-94-U: Ontario Public Service Employees Union (Applicant) v. Mains Ouvertes - Open Hands Inc. (Respondent) (*Withdrawn*)

2410-94-U: Crystal Springs Employees (Applicant) v. Teamsters Local Union 938 (Respondent) (*Withdrawn*)

2452-94-U: Ontario Public Service Employees' Union, Ontario Public Service Employees' Union, Local 225 (Applicant) v. Harc Inc. (Respondent) (*Withdrawn*)

2460-94-U: Tim Fairs (Applicant) v. Charlie MacDonald and G.M. of Canada (Respondents) (*Dismissed*)

2488-94-U: Almaguin Health Centre (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

2538-94-U: United Steelworkers of America (Applicant) v. Peel Paper Products Ltd. (Respondent) (*Endorsed Settlement*)

2544-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. 1016784 Ontario Limited c.o.b. as A.I.M.E.S. Industrial Maintenance and Engineering Services; and Casco Inc. (Respondents) (*Withdrawn*)

2625-94-U: CUPE Local #3501 (Applicant) v. The Boy's Home (Respondent) (*Withdrawn*)

2651-94-U: Leslie Arthur Swan (Applicant) v. Local Union 46 of the United Association of Plumbers, Steamfitters, and Apprentices (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

2242-94-M: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Superior Laminated Co. Ltd. (Respondent) (*Withdrawn*)

2280-94-M: IWA Canada (Applicant) v. Leo Sakata Electronics (Canada) Ltd. (Respondent) (*Granted*)

2323-94-M: United Brotherhood of Carpenters and Joiners of America, Local 2000 (Applicant) v. Eddy Match Company Limited (Respondent) (*Withdrawn*)

2328-94-M; 2539-94-M: United Steelworkers of America (Applicant) v. Peel Paper Products Ltd. (Respondent) (*Withdrawn*)

2461-94-M: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Meadowcroft Holdings Inc. and/or Meadowcroft Holdings Inc. c.o.b. as Meadowcroft Place, Kitchener, The Meadowcroft General Partnership, Execu-Care Nursing Services, and/or Kitchener Meadowcroft General Partner Ltd. and/or Escapade Investments Ltd., and/or The Meadowcroft Group Ltd., and/or Kitchener Meadowcroft Limited Partnership and/or 5M Management Services Limited (Respondents) (*Withdrawn*)

2529-94-M: Labourers' International Union of North America, Local 493 (Applicant) v. Commonwealth Plywood Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2495-94-M: Denise Gemmell (Applicant) v. United Food and Commercial Workers, Local 175 and Valdi Foods Inc. (Respondents) (*Withdrawn*)

JURISDICTIONAL DISPUTES

3183-91-JD: Labourers International Union of North America, Ontario Provincial District Council Locals 506

and 1081 (Applicant) v. Robertson Yates Corporation Limited, United Floor Company Ltd., United Brotherhood of Carpenters and Joiners of America, Local 785 (Respondents) (*Dismissed*)

3782-93-JD: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association and Power Workers' Union (Respondents) (*Granted*)

0038-94-JD: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Power Workers' Union (Respondents) (*Withdrawn*)

1140-94-JD: Office and Professional Employees International Union, Local 343 (Applicant) v. Ontario Secondary School Teachers' Federation and Ontario Secondary School Teachers' Federation Staff Association (Respondents) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3539-92-OH: C.E.P., Local 99 (Applicant) v. Grant Forest Products Corp. (Respondent) (*Withdrawn*)

2131-93-OH: Victor Rochon (Applicant) v. The Peelle Company of Canada Limited (Respondent) (*Terminated*)

4272-93-OH: Gary McCullogh (Applicant) v. General Motors of Canada Limited, Fred Cambers and Drew Smith (Respondent) (*Withdrawn*)

0889-94-OH: Daniel Robinson and Barry Stott (Applicants) v. Tackaberry Heating Supplies Ltd. (Respondent) (*Withdrawn*)

1916-94-OH: Kevin M. Fetterly (Applicant) v. Ashwarren International Inc., Canadian Emulsion Systems Ltd. (Respondents) (*Withdrawn*)

1917-94-OH: Zbigniew Hermaszuk (Applicant) v. Champion Road Machinery Ltd. (Respondent) (*Dismissed*)

1980-94-OH: Alysia Danielle Greer (Applicant) v. United Design Canada Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1095-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

2040-93-G; 3342-93-G: Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Applicant) v. Mount Royal Contracting (Respondent); Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Applicant) v. Mount Royal Concrete Floor (Canada) Ltd., c.o.b. Mount Royal Contracting, and D.M.B. Contracting and M.B. Contracting (Respondent) (*Endorsed Settlement*)

2414-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. All Point Cabling Inc. (Respondent) v. Electrical Contractors Association of Ontario (Intervener) (*Endorsed Settlement*)

2953-93-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 134518 Canada Inc. and/or Rockform Concrete Forming (London) Limited and/or 447774 Ontario Ltd. (Respondent) (*Granted*)

0275-94-G: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Hi-Grade Welding Co. Ltd. and Ro-Les Enterprises Limited (Respondents) (*Withdrawn*)

0460-94-G: United Brotherhood of Carpenters and Joiners of America and Local 1988, United Brotherhood of Carpenters and Joiners of America (Applicant) v. W.D. LaFlamme Limited (Respondent) (*Withdrawn*)

0473-94-G; 1522-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. T.B. Kerr Construction Inc. (Respondent); Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. T.B. Kerr Construction Services Inc. (Respondent) (*Endorsed Settlement*)

0529-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. National Masonry Inc. (Respondent) (*Withdrawn*)

0691-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. TESC Contracting Limited (Respondent) (*Endorsed Settlement*)

0738-94-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. George and Asmussen (Respondent) (*Withdrawn*)

0790-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Aspen Interiors Systems Ltd. (Respondent) (*Withdrawn*)

1047-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Apartment Builders' Association (Respondent) (*Dismissed*)

1324-94-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Norm's Erection Service Incorporated (Respondent) (*Endorsed Settlement*)

1555-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Blockline Contracting (Div. 1024886 Ontario Limited) (Respondent) (*Granted*)

1996-94-G; 2345-94-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Phoenix Elevator Inc. (Respondent); International Union of Elevator Constructors, Local 50 (Applicant) v. Adco Elevator Service Ltd. (Respondent) (*Endorsed Settlement*)

2005-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Houston Construction Ltd. o/a Forest Hill Carpentry Contractors and Forest Hill Carpentry and 627175 Ontario Inc. o/a Forest Hill Carpentry (Respondents) (*Endorsed Settlement*)

2024-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Spencer Steel Limited (Respondent) (*Endorsed Settlement*)

2078-94-G: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Allan Michaels Electric Ltd. (Respondent) (*Endorsed Settlement*)

2142-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 (Applicant) v. Calorific Construction Limited (Respondent) (*Endorsed Settlement*)

2152-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. Campbell Cox Inc. (Respondent) (*Withdrawn*)

2154-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Huffman Bros. Welding Ltd. (Respondent) (*Endorsed Settlement*)

2172-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. M & K Steel Erectors Inc., Simcoe Erectors (Respondents) (*Endorsed Settlement*)

2194-94-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Interwide Sheet Metal Ltd. (Respondent) (*Granted*)

2197-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Marli Mechanical Ltd. (Respondent) (*Endorsed Settlement*)

2243-94-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Felco Elevator Company (Respondent) (*Withdrawn*)

2254-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Strata Contractors Ltd. (Respondent) (*Endorsed Settlement*)

2278-94-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vantage Electrical Services Inc. and/or The Gimi Construction Company Ltd. and/or Gimi Developments Inc. (Respondents) (*Endorsed Settlement*)

2290-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Oshawa Steel Reinforce (Respondent) (*Endorsed Settlement*)

2292-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Mac Reinforcing Ltd. (Respondent) (*Endorsed Settlement*)

2298-94-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Fraser-Vien Ltd. (Respondent) (*Endorsed Settlement*)

2302-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Ambient Mechanical Ltd. (Respondent) (*Withdrawn*)

2307-94-G: Labourers' International Union of North America, Local 527 (Applicant) v. Advance Cutting and Coring Ltd. (Respondent) (*Endorsed Settlement*)

2313-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Markey Brothers Construction Inc. (Respondent) (*Endorsed Settlement*)

2325-94-G: Sheet Metal Workers' International Association, Local 269 (Applicant) v. B.M.J. Welding (Respondent) (*Endorsed Settlement*)

2330-94-G: Teamsters Local Union No. 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. Gottardo Brothers Excavating Ltd. (Respondent) (*Withdrawn*)

2343-94-G: International Union of Bricklayers Local 2 (Applicant) v. Bigelow-Liptak of Canada Ltd. (Respondent) (*Endorsed Settlement*)

2355-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Sheafer-Townsend Mechanical-Electrical Ltd. (Respondent) (*Withdrawn*)

2363-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. C.A.K. Masonry Ltd. (Respondent) (*Withdrawn*)

2377-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Royal Forming (1994) Limited (Respondent) (*Endorsed Settlement*)

2382-94-G: International Union of Bricklayers and Allied Craftsmen Local #20 Ontario (Applicant) v. Bernel Masonry Ltd. (Respondent) (*Withdrawn*)

2388-94-G: United Brotherhood of Carpenters and Joiners of America, Acoustic and Drywall Local 1316 (Applicant) v. York Lathing Inc. (Respondent) (*Endorsed Settlement*)

2414-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. Devon Structural Limited (Respondent) (*Granted*)

2422-94-G: Christian Labour Association of Canada (Applicant) v. Upper Canada Insulation Services Inc. (Respondent) (*Withdrawn*)

2437-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Concrete Forming (Respondent) (*Endorsed Settlement*)

2459-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Lumar Construction Ltd. (Respondent) (*Granted*)

2476-94-G: Construction Workers Local No. 52, affiliated with the Christian Labour Association of Canada (Applicant) v. Mirtren Contractors Limited (Respondent) (*Endorsed Settlement*)

2497-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Endorsed Settlement*)

2500-94-G; 2504-94-G; 2506-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lynx Cabling Systems Limited (Respondent); International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. John W. Baldwin Electric Company Limited (Respondent); International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. D.J. Charlton Power Line (Respondent) (*Withdrawn*)

2503-94-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Endorsed Settlement*)

2512-94-G: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. General Interior Contracting (Windsor) Inc. and Lakeview Painting (1990) Limited (Respondents) (*Endorsed Settlement*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDAA

3643-93-M: Service Employees Union, Local 183 (Applicant) v. Hillsdale Terrace Retirement Home (Respondent) (*Granted*)

0583-94-U: Surex Community Services (Applicant) v. Ontario Public Service Employees Union and its Local 5102 (Respondent) (*Granted*)

1857-94-U: United Steelworkers of America (Applicant) v. Meadowcroft Place (York Mills) Limited and Execu-Care Nursing Services Limited and 5M Management Services (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3055-89-R: David Dooley, on behalf of a group of employees of Ken Scharf Construction Limited (Applicant) v. Labourers' International Union of North America, Local 527, Local 183, Local 247, Local 491, Local 493, Local 506, Local 597, Local 607, Local 625, Local 837, Local 1036, Local 1059, Local 1081 and Local 1089, Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. Ken Scharf Consturction Limited (Intervener) (*Withdrawn*)

0148-93-U: Richard Moore (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Refrigeration Workers of Ontario) and Joe Carricato (Respondent) (*Dismissed*)

1424-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Bayritz Construction Ltd. and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry, Sundial Bricklayers Inc. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Denied*)

1815-93-OH: Manuel Gutierrez, Nelson Arias, and Jose Luis Picon (Applicant) v. Environmental Abatement Services Inc. (Respondent) (*Dismissed*)

1984-93-U: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and The Ontario Provincial Conference of Bricklayers and Allied Craftsmen (Applicants) v. Bayritz Construction Ltd. and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry and Sundial Bricklayers Inc. and Labourers' International Union of North America, Local 183 (Respondents) (*Denied*)

2909-93-U: Rheel V. Dionne, Norton Smith, Robert Taylor, Robert Hastie, John A. MacDonald Robert Burgon, and 91 persons listed on Appendix "A" (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 199 (St. Catharines) and its Local 1973 (Windsor) (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)

0764-94-OH: William J. Viveen (Applicant) v. National Steel Car Limited (Respondent) (*Dismissed*)

0924-94-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. Michael York (Toronto) Limited c.o.b. as Campbellford I.G.A. (Respondent) (*Denied*)

1429-94-R: William Bradford (Applicant) v. United Food and Commercial Workers' International Union, AFL, CIO, CLC, Local 1000A (Respondent) v. Bavarian Meat Products Limited (Intervener) (*Dismissed*)

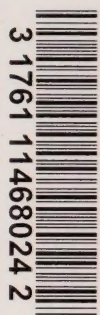
1711-94-U: Robert Crevier (Applicant) v. St. Joseph's Health Centre of Sarnia and London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Respondents) (*Dismissed*)

1938-94-U: Ranjit Singh Brar (Applicant) v. The Chrysler Corp. Bramalea Assembly Plant, Canadian Auto Workers Union (Respondents) (*Dismissed*)

1993-94-U: Melissa Steidman (Applicant) v. Carol Hughes (Respondent) (*Dismissed*)

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